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R E P O R T S
O F
C A S E S

A R G U E D and A D J U D G E D

I N T H E

King's Courts at Westminster,

I n T W O P A R T S.

PART I. Containing CASES in the Court of KING's BENCH, &c. beginning in HILARY TERM in the 16th Year of the Reign of KING GEORGE the Second, and ending in HILARY TERM in the 26th.

PART II. Containing CASES in the Court of COMMON PLEAS, &c. beginning in HILARY TERM in the 26th Year of the Reign of KING GEORGE the Second, and ending in TRINITY TERM in the 9th Year of the Reign of his present Majesty KING GEORGE the Third.

By G E O R G E W I L S O N, Serjeant at Law. K

With TABLES of the PRINCIPAL MATTERS, Names of the CASES contained in both Parts; and some Account of the Lords the Judges, Serjeants at Law, and most eminent Counsel attending the Bar during that Time

L O N D O N : 122

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M D C C L X X.

11

REPORTS

CASES

ARGUED and ADJUDGED

IN THE

Kings Courts at Westminster

In T W O P A R T S



GEORGE WILSON, Esq. at Law.

WITH TABLES of the PRINCIPAL MATTERS, Names of the
CASSES contained in both Parts; and some Account of the
JUDGES, SOVERAIGNS, LAW, and other eminent Gentlemen, who have
been concerned in the same.

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A TABLE of the Names of the *Judges,*
&c. in the Courts at *Westminster*, in
the Years when these CASES were
adjudged.

IN CHANCERY.

HILARY TERM 16 Geo. 2. 1742. O. S. *Philip Lord Hardwicke* Baron of *Hardwicke* in the county of *Gloucester* was Chancellor, and continued so until *Michaelmas Term* 30 Geo. 2. On the 19th of *November* 1756, he resigned the Great seal, which was the same day given in commission to Sir *John Willes* Knight, Lord Chief Justice of the Common Bench, Sir *Sydney Stafford Smythe* Knight a Baron of the Exchequer, and Sir *John Eardly Wilmot* Knight a Judge of the King's Bench.

On *Thursday June* the 30th 1757, being the very next day after *Trinity Term* 30 & 31 Geo. 2. the above Lords Commissioners resigned the Great seal, which at the same time was delivered by the King to Sir *Robert Henley* Knight, his attorney general who was appointed *Lord Keeper* thereof.

In the beginning of the year 1760. the Lord Keeper *Henley* was created a peer by the stile and title of *Robert Lord Henley*, Baron of *Grainge*, in the county of *Southampton*, and appointed Lord High Steward of England, before whom, and his peers, on the 16th and 17th of *April* 1760. *Lawrence* earl of *Ferrers* was tried and found guilty of murder *nem. con.* and on *Friday* the 18th received sentence to be hanged on *Monday* following, and to be anatomized; but was respited till *May* the 6th following, when he was hanged at *Tyburn*.

King *George* the 2d died at *Kensington*, *October* 25th 1760.

A few days before *Hilary Term* 1 Geo. 3. 1761. the Lord Keeper *Henley* delivered the Great seal to the young King, who immediately re-delivered it to him by the stile of *Lord Chancellor*; and some time after he was created Earl of *Northington*, and about the same time the patents of all the 12 Judges were renewed by King *Geo.* the 3d.

In the vacation after *Trinity Term* 6 Geo. 3. 1766. the earl of *Northington* resigned the Great seal, which at the same time was delivered to *Charles* lord *Camden*, baron of *Camden-place*, in the county of *Kent*, Lord Chief Justice of the court of common Bench, by the stile of Lord Chancellor, who at the time of publishing these Cases, presides in the high court of chancery with great dignity.

A T A B L E of the Judges, &c.

Hilary Term 16 Geo. 2. 1742. *William Fortescue*, Esq; Master of the rolls, continued so until he died in 1749; Sir *John Strange*, immediately succeeded him, and continued Master of the rolls till he died in *Trinity Term* 27 & 28 Geo. 2. 1754. Sir *Thomas Clarke* Knight, immediately succeeded him, and continued Master of the rolls till he died in *Michaelmas Term* 4 Geo. 3. 1763. and in *Hilary Term* following Sir *Thomas Sewell* Knight succeeded him, and is now Master of the rolls.

J U S T I C E S of the K I N G ' S B E N C H.

Hilary Term 16 Geo. 2. 1742. O. S. Sir *William Lee* Knight, Lord Chief Justice, Sir *William Chapple* Knight, *Martin Wright* Esq; and *Thomas Denison* Esq; justices.

In *Hilary* vacation 1744-5. O. S. Mr. Justice *Chapple* died, and Sir *Michael Foster* Knight, Serjeant at law, recorder of *Bristol* was made Justice of the King's Bench in his room, in the following term,

Sir *William Lee* Knight, Lord Chief Justice died in *Hilary* vacation 1754, and on the 2d of *May* 1754, Sir *Dudley Rider* knight, the King's attorney general was made a Serjeant at law, and Lord Chief Justice *B. R.* in his room.

In *Hilary Term* 28 Geo. 2. 1755. Sir *Martin Wright* Knight, the Senior *Puisne* judge resigned, by reason of a weakness in his eyes, and had a pension granted to him for his faithful service; and on the 11th of *February* Sir *John Eardly Wilmot* Knight, an eminent barrister was called to the degree of Serjeant at law, made a judge of *B. R.* and next day took his seat in court.

On *Tuesday* the 25th of *May* in *Easter Term* 29 Geo. 2. 1756. Sir *Dudley Rider* Knight, Chief Justice of *B. R.* died at his house in *Chancery Lane*: in *Trinity Term* following (there being no Chief Justice appointed) Mr. justice *Denison* presided with great ability, and the business of the court was well dispatched.

On *Monday* *November* the 8th 1756. in *Michaelmas Term* 30 Geo. 2. The honourable *William Murray* Esq, the king's attorney general was called to the degree of Serjeant at law, and the same day was created a peer by the style and title of *William Lord Mansfield* Baron of *Mansfield*, in the county of *Nottingham*, appointed Chief Justice *B. R.* and took his place in court the 11th of the same month.

On *Monday* the 7th of *November* 1763. the first day of *Michaelmas Term* 4 Geo. 3. Sir *Michael Foster* died, and in *Hilary Term* following

A TABLE of the Judges, &c.

ng Sir *Joseph Yates* Knight, an eminent barraster* was called to the degree of Serjeant at law, and made a judge of *B. R.* in the room of Mr. Justice *Foster*.

In *Easter Term* 5 *Geo. 3.* 1765. Sir *Thomas Denison* Knight, the Senior *Puisne* Judge resigned by reason of age and infirmities, and had a pension granted to him for his long and faithful service; in the same term Sir *Richard Aston* Knight, Lord Chief Justice of the Common Pleas in *Ireland*, was called to the degree of Serjeant at law, and made a judge of *B. R.* in his room.

Towards the latter end of the vacation after *Trinity Term* 6 *Geo. 3.* 1766. Sir *John Eardly Wilmot* Knight, a Judge of *B. R.* was appointed Lord Chief Justice of the court of Common Bench, in the room of Lord *Camden* promoted to the Great seal; and *James Hewitt* Serjeant at law was made a judge of *B. R.* in the room of Mr. Justice *Wilmot*.

In *December* 1767. *James Hewitt* Esq; a judge of the King's Bench was appointed Lord chancellor of *Ireland*, and created a peer of that kingdom by the title of Baron *Lifford*.

January 27th 1768. *Hilary Term* 8 *Geo. 3.* *Edward Willes* Esq; the King's solicitor general, second son of the late Lord Chief Justice *Willes*, was made a Serjeant at law, and a judge of *B. R.* in the room of Mr. justice *Hewitt*, now Lord Chancellor of *Ireland*.

The judges of the King's Bench at the time of publishing these *Cases* are—*William* lord *Mansfield* Chief Justice, Sir *Joseph Yates*, Sir *Richard Aston*, and *Edward Willes* Esq; justices.

J U S T I C E S of the C O M M O N B E N C H.

Hilary Term 16 *G. 2.* 1742. O. S. Sir *John Willes* Knight, Lord Chief Justice, Sir *John Fortescue Aland* Knight, Sir *Thomas Abney* Knight, and *Thomas Burnett* Esq; justices.

In *Trinity Term* 19 & 20 *Geo. 2.* 1746. Mr. justice *Fortescue* resigned, and Sir *Thomas Birch* Knight, Serjeant at law was made a judge in his room.

Mr. justice *Abney* died about the latter end of *Easter Term* 23 *Geo. 2.* 1750. and in *Trinity Term* following *Nathaniel Gundry* Esq; an eminent barraster was made a Serjeant, and a judge of the *C. B.* in his room.

Mr. justice *Burnett* died about the 6th of *January* 1763. N. S. and Sir *Edward Clive* Knight, a Baron of the exchequer in *Hilary Term* following was made a judge of the *C. B.* in his room.

Mr.

A TABLE of the Judges, &c.

Mr. Justice *Gundry* died in *Hilary* vacation 27 Geo. 2. 1754. upon the *Western* circuit, and on the 2d of May 1754. in *Easter Term* 27 Geo. 2. The honourable *Henry Batburst* Esq; one of his Majesty's learned counsel, was made a Serjeant at law, a judge of the C. B. and took his seat in court May the 6th 1754.

Mr. justice *Birch* died *March* the 14th 1757. and in *Easter Term* next following the honourable *William Noel* Esq; one of his Majesty's learned counsel was made a Serjeant at law, and a judge of the C. B. in his room.

On *Tuesday December* the 15th 1761. Lord Chief Justice *Willes* died about one o'clock in the morning, at his house in *Bloomsbury Square*; on the first day of *Hilary Term* 2 Geo. 3. 1762. Sir *Charles Pratt*, the King's attorney general, was made a Serjeant at law appointed Lord Chief Justice of the C. B. and took his place in court on *Monday* the 25th of *January* 1762.

On the 24th of *January* 1763. in *Hilary Term* 3 Geo. 3. Sir *Henry Gould* Knight, one of the Barons of the Exchequer, having lately been appointed a judge of the C. B. took his place in court.

In the vacation after *Trinity Term* 5 Geo. 3. 1765. the right honourable Sir *Charles Pratt*, Lord Chief Justice of the C. B. was created a peer of the realm by the style and title of *Charles Lord Camden*, Baron of *Camden-place* in the county of *Kent*.

In the vacation after *Trinity Term* 1766. the honourable Sir *John Eardley Wilmot* Knight, one of the judges of the King's Bench, was appointed Lord Chief Justice of the C. B. (in the room of Lord *Camden*) and took his seat in court in *Michaelmas Term* the 7th of Geo. 3.

The judges of the Common Bench at the time of publishing these Cases are, Sir *John Eardley Wilmot* Knight, Lord Chief Justice, Sir *Edward Clive* Knight, the honourable *Henry Batburst* Esq; and Sir *Henry Gould* Knight, justices.

BARONS of the EXCHEQUER.

Hilary Term 16 Geo. 2. 1742. O. S. Sir *Thomas Parker* Knight, Lord Chief Baron, Sir *Lawrence Carter* Knight, *John Reynolds* Esq; and *Charles Clarke* Esq; barons.

In *Hilary* vacation 1744 O. S. Mr. Baron *Carter* died, and in *Easter Term* 18 Geo. 2. 1745. *Edward Clive* Esq; a learned barrister was made a Serjeant at law, and a Baron.

In *Easter Term* 1747. Mr. Baron *Reynolds* died, and the honourable *Heneage Legge* Esq; was made a Serjeant at law, and a Baron in *Trinity Term* 21 Geo. 2. 1747. In

A TABLE of the Judges, &c.

In *Easter Term* 23 Geo. 2. 1750. Mr. Baron *Clarke* died, and in *Trinity Term* 24 Geo. 2. 1750. *Sidney Stafford Smythe* Esq; one of the King's learned counsel was made a Serjeant at law, and a Baron.

On the 3d of *February* in *Hilary Term* 26 Geo. 2. 1753. N. S. Sir *Richard Adams* Knight, Recorder of *London*, was made a Serjeant at law, and a Baron of the Exchequer, in the room of Mr. Baron *Clive*, who was removed to the Common Bench.

In *Trinity* vacation 32 & 33 Geo. 2. 1759. Mr. Baron *Legge* died at *Bristol*; and in *Michaelmas Term* following Sir *Richard Loyd* Knight, was made a Serjeant at law, and Baron of the Exchequer.

In *Trinity* vacation 1 Geo. 3. 1761. Mr. Baron *Loyd* died, (at *Northallerton* in *Yorkshire*, in his return from *Newcastle*, where he had been to try some rebels against the *Militia*) and in *Michaelmas Term* following, Sir *Henry Gould* Knight, one of his Majesty's learned counsel, was made a Baron of the Exchequer.

In *Hilary Term* 3 Geo. 3. 1763. *George Perrott* Esq; one of his Majesty's learned counsel was made a Serjeant at law, and a Baron of the Exchequer, in the room of Mr. Baron *Gould*, who was removed to the Common Bench.

The Barons of the Exchequer, at the time of publishing these Reports are, Sir *Thomas Parker* Knight, Lord Chief Baron, Sir *Sidney Stafford Smythe* Knight, Sir *Richard Adams* Knight, and *George Perrott* Esq; Barons.

Some Account of the most eminent COUNSEL at the BAR, in
the Years when these CASES were adjudged.

HILARY TERM 16 Geo. 2. 1742.

MATTHEW Skinner, the King's first Serjeant at law, Chief Justice of *Chester*.

Sir *Dudley Rider* Knight, the King's Attorney General.

The honourable *William Murray* Esq; the King's Solicitor General.

King's Serjeants at Law.

Samuel Prime, *Thomas Birch*, *Edward Willes* Attorney of the *Dutchy*.

Serjeants at Law.

John Belfield, *Simon Umlin* Recorder of *London*, *Thomas Hussy*, *Abraham Gapper*, *William Wynne*, *John Agar*, *Richard Draper*, *William Hayward*, *Thomas Barnardiston*, *Edward Bootle*, *Edward Leeds*, *William Eyre*.

King's Counsel extraordinary.

Thomas Bootle Chancellor to the Prince of *Wales*.

William Pauncefort Attorney General to the Prince.

The hon. *Alexander Hume Campbel*, Solicitor General to the Prince.

John Brown, *William Noel*, *Thomas Clarke*, *John Strange*, *Richard Loyd*, *Heneage Legge*, *Nathaniel Gundry*.

In *Hilary Term* 19 Geo. 2. 1745. O. S. the honourable *Henry Bathurst* was made King's counsel, and Solicitor General to the Prince of *Wales* in the room of *Alexander Hume Campbel*.

Trinity Term 21 Geo. 2. *Henry Banks*, *Sidney Stafford Smythe*, made King's counsel: *Leeds* the King's Serjeant: and on the 23d of *June* 1747. *David Poole* was made a Serjeant.

Michaelmas Term 23 Geo. 2. 1749.

Skinner, the King's first Serjeant died, and Sir *Samuel Prime* Knight, then was the King's first Serjeant.

In *Trinity* vacation 24 & 25 Geo. 2. 1751. Serjeant *Belfield* was overturned in his chariot upon the *Western* circuit, and was so much hurt that he died in 24 hours afterwards, having gone that circuit above 120 times, *ut audivi*.

In *Michaelmas Term* 25 Geo. 2. 1751, *Robert Henley* Esq; recorder of *Bath*, was made King's counsel.

In the vacation after *Trinity Term* 1752. Serjeant *Barnardiston* died. Sir *Thomas Bootle* Chancellor to the late Prince of *Wales*, died at *Oxford*, in the year 1753.

February 3d 1753. the Reporter was made Serjeant at law.

Serjeant *Agar* died the 7th of *January* 1754.

In *Hilary* vacation 27 Geo. 2. 1754. *Henry Gould*, *Charles Pratt*, *Fletcher Norton*; *Thomas Sewell*, and the honourable *Charles Yorke* were made King's counsel.

In *Easter Term* 27 Geo. 2. 1754. the honourable *William Murray* was made Attorney General, and Sir *Richard Loyd* Solicitor General to the King.

February 11th 1755. *Hilary Term* 28 Geo. 2. *Lomax Martin*, *James Hewitt*, and *William Davy* were made Serjeants at law: and about this time Serjeant *Draper* died, and Serjeant *Leeds* left the bar.

In *October* 1756, Sir *Robert Henley* was made Attorney General, and the honourable *Charles Yorke* Solicitor General to the King.

November

Some Account of the most eminent Counsel.

November 11th 1756. *Edward Willes* Esq; made King's counsel, and this day took his place within the bar.

March 7th 1757. Serjeant *Willes* was appointed Lord Chief Baron of the Exchequer in *Ireland*.

May 3d 1757. *Thomas Stanyforth* and *James Forster* were made Serjeants at law, and the same day Serjeant *Poole* was sworn King's Serjeant, and *George Perrott* King's counsel.

Easter Term 31 Geo. 3. *Eliab Harvey* made King's counsel.

Trinity Term 1758. Sir *Samuel Prime* Knight, the King's first Serjeant retired from the bar, where he had long practiced in full business to the last, with the greatest honour and ability.

In Trinity vacation 1758. Serjeant *Martin* died.

In Michaelmas vacation 1758. Serjeant *Leeds* died, Serjeant *Hewitt* made King's Serjeant soon afterwards.

February the 6th 1759. *William Whitaker*, *George Nares*, and *Anthony Keck* made Serjeants at law, the two first went out King's Serjeants.

Serjeants at Law and King's Counsel in Hilary Term 32 Geo. 2. 1759.

Sir *Samuel Prime* Knight, the King's first Serjeant (retired.)

Sir *Charles Pratt* Attorney General to the King.

The honourable *Charles Yorke*, Solicitor General to the King.

King's Serjeants at Law.

David Poole, *James Hewitt*, *William Whitaker*, *George Nares*.

King's Counsel.

Richard Loyd, *Richard Aston*, *Henry Gould*, *Edward Willes*, *Thomas*

Sewell, *William De Grey*, *Fletcher Norton*, *George Perrott*, *John Morton*, *Eliab Harvey*.

Serjeants at Law.

William Wynne, *William Hayward*, *George Wilson*, *William Davy*, *Thomas Stanyforth*, *James Foster*.

Michaelmas Term 2 Geo. 3. 1761.

Dr. *William Blackiston* and *Charles Ambler*, lately made King's counsel.

Saturday November 7th 1761. *Joseph Sayer* made a Serjeant.

January 23d 1762. *John Burland* made a Serjeant at law.

Richard Haffey, *Edward Thurloe*, — *Webb* lately made King's counsel.

On Friday October 29th 1762. Serjeant *Poole* died at *Bath*, whither he had retired ever since last Hilary Term.

In Michaelmas vacation 1762. Serjeant *Davy* was made King's Serjeant.

In Hilary Term 3 Geo. 3. 1763. *John Aspinall*, and *John Glynn* made Serjeants at law.

John Morton King's counsel, appointed Chief Justice of *Chester*.

Serjeant *Hayward* died about this time in *Shropshire*.

Alexander Wedderburn made King's counsel about this time.

Mr. *Yorke* the Attorney General resigned a little before Michaelmas Term 4 Geo. 3. 1763.

Hilary Term 4 Geo. 3. 1764. Serjeant *Hewitt* voluntarily resigned his patent of King's Serjeant; Sir *Fletcher Norton* being some time before Solicitor General, was about this time made Attorney General, and *William De Grey* Solicitor General to the King.

May 23d 1764. Serjeant *Burland* made King's Serjeant, and *Richard Clayton* King's counsel.

In Hilary vacation 5 Geo. 3. 1765. Serjeant *William Eyre* died in *Queen's Square*,

Some Account of the most eminent Counsel.

Square, in the parish of *St. George the Martyr*.

April 24th Easter Term 5 Geo. 3. 1765, Richard Leigh, and William Jephson made Serjeants at law.

In *Trinity vacation 5 Geo. 3. 1765.* the honourable *Mr. Yorke* again made Attorney General, in the room of *Sir Fletcher Norton*, who still continues the King's counsel.

Some time afterwards *Mr. Yorke* again resigned, and *William De Grey* was made Attorney General, and *Edward Willes* Solicitor General.

In *Hilary Term 8 Geo. 3. 1768.* *John Dunning* was made the King's Solicitor General.

Hilary vacation 1769. James Wallace made King's counsel.

The Lord Chancellor, Judges, Serjeants at law, and King's Counsel, at the Time of publishing these Cases.

Charles Lord Camden Chancellor.

William Lord Mansfield, Chief Justice B. R.

Sir Thomas Sewell Knight, Master of the Rolls.

Sir John Eardly Wilmot Knight, Lord Chief Justice C. B.

Sir Thomas Parker Knight, Lord Chief Baron of the Exchequer.

Sir Edward Clive Knight, Justice C. B.

Sir S. S. Smythe Knight, Baron of the Exchequer.

Sir Richard Adams Knight, Baron of the Exchequer.

The honourable *Henry Bathurst* Esq; Justice C. B.

Sir Henry Gould Knight, Justice C. B. *George Perrott* Esq; Baron of the Exchequer.

Sir Joseph Yates Knight, Justice B. R.

Sir Richard Aston Knight, Justice B. R.

Edward Willes Esq; Justice B. R.

William Whitaker first Serjeant to the King.

William De Grey Attorney General.

John Dunning Solicitor General.

Sir Samuel Prime Knight, the late King's most ancient Serjeant retired.

King's Serjeants.

George Nares, William Davy, John Burland.

Serjeants.

George Wilson, James Forster, Joseph Sayer, John Aspinall (retired.) *John Glynn, Richard Leigh, William Jephson* and *Anthony Keck* (retired.)

King's Counsel.

Sir Fletcher Norton made Chief Justice in Eyre, and retired from the bar last *Hilary Term*.

John Morton, Richard Hussey, Charles Ambler, William Blackstone, Edward Thurlow, Alexander Wedderburn, James Wallace.

Eliab Harvey died in the vacation after *Trinity Term 9 Geo 3. 1769.*

Hilary

Hilary Term

16 Geo. 2. 1742.

Morris *versus* Barry. B. R. In Error.

ERROR in ejectment from *Ireland*; the declaration sets forth, that *Hen. Murry, Esq;* on the 3d day of *March* 1740. at *Drum* in the county of *Tipperary*, did demise one castle, 50 messuages, &c. *cum pertin'* to the plaintiff, *habendum* to plaintiff from the said 3d day of *March* for eleven years from thence next ensuing, and also that *Lady Middleton* on the same day and year demised the same premisses to the plaintiff, *habendum* for the same term; by virtue of which said demises, plaintiff entred and was possessed until the defendant ejected him; upon Not guilty a verdict was found for the plaintiff; and the entry of the judgment was, that the plaintiff do recover his *said terms* (in the plural number) of and in the said tenements, &c.

If by any intendment a judgment in ejectment after a verdict can be made good, the court will do it.
2 Stra. 1180.
S. C.

And now upon the common errors assigned, *Booth* serjeant, argued for the defendant in the original cause, that this judgment was erroneous; 1st, Because as both the demises are of the same date, of the same lands, and for the same term, both the lessors could not have title at the same time, and therefore the plaintiff below could not enter by virtue of both demises, so that upon his own shewing in his declaration he cannot have a right to recover both the terms. 2^{dly}, That no intendment whatever could make this good.

Farresley 148.
Hart and Longfield,
Hil. 4 Annæ
Non prof. entred as to all the demises but one, and that made it good.

Sir *John Strange* for the defendant in error insisted, that if by any means whatever this judgment could be helped, the court would do it; and he put this case to shew that the plaintiff might possibly have a title as laid in the declaration, *viz.* That if there be two jointenants, and one of them makes a lease of the whole land at one time, and the other makes a lease of the whole land at another time of the same day, the moiety of each jointenant will only pass; and in such case the plaintiff in this ejectment could not have declared more properly than he has done, he could not have declared upon a single demise. *Worrall and Beck, Mich. 3 Geo. 2.* In ejectment on two

B

demises

demises of different lands laid so as to be two different demises, the judgment was, that plaintiff do recover his term; the objection was, that it should have said that plaintiff do recover his terms in the plural number; but the court in that case said they would extend the word *term* to his term in *A.* and his term in *B.* and accordingly judgment was for the plaintiff. Sir *J. Strange* took a distinction between the case at bar and that in *Farresley*, for that was a contract between the same persons, and so is not this.

Bootle serjeant said, that in *Mich.* ——— *Goodright ex dim' Griffith v.* ——— judgment was reversed, because the premises were laid to be in the said counties, or one of them.

C. J. Lee: If by any means whatever the plaintiff can be supposed to have a title as laid in the declaration, as this is after a verdict, we will hold this judgment right, and there is no inconsistency, but that two leases for the same term and of the same land may be good; for two jointenants in the case supposed by Sir *J. Strange*, each of them as they are seised *per mie & per tout*, may make a lease of the whole, although his moiety will only pass, and they will be several terms as they arise from the several interests of several persons, though they are the same in point of duration. My *Ld.* cited a case, *Trin. 4 & 5 G. 2. Fisher v. Hughes* in ejectment; upon three demises by several lessors of the same premises; as to two demises judgment was entred for plaintiff, as to the other demise it was entred for the defendant; the objection was, that there was judgment both for the plaintiff and defendant, but the court held the judgment right; this was by writ of error from the grand sessions in *Wales*.

Judgment affirmed by the whole court.

John Martin, of the demise of Thomas Tregonwell,
versus John Strachan and Luke Harrison. B. R.

2 Stra. 1179.
S. C.

Tenant in tail
by purchase
with rever-
sion in fee
by descent
(both ex
parte mater-
na) suffers a
recovery, the
old use is
gone, and it
descends to
his own right
heirs.

EJECTMENT for lands in *Milton* in the county of *Dorset*; Not guilty, special verdict found, upon which this question rises, *viz.* Whether the estate of which *Jacob Banks* died seised in fee shall descend to the lessor of the plaintiff as heir *ex parte materna*, because unless there be a good title found for him upon this ground, the possession of the defendant is sufficient to intitle him to judgment.

The case is shortly this: *Jacob Banks*, tenant in tail by purchase under a marriage settlement made by his ancestor *ex parte materna* in 1680. with remainder in tail to *George Rooke* and — *Alb.* with reversion in fee to himself by descent *ex parte materna*, suffered a common recovery to the use of himself in fee, and died so seised without issue.

Now

Now the rule of descent is well known, if a man seised as *heir* by descent *ex parte maternâ* makes a feoffment in fee to the use of his own right heirs, it shall descend to his heir *ex parte maternâ*. *Co. Lit.* 13. 3 *Lev.* 406. and it will be the same if he suffer a common recovery to the use of his own right heirs, as is laid down in the case of *Abbot and Burton*, *Salk.* 590. but this rule only holds where the persons take by *descent*; in the present case *J. Banks* the tenant in tail took the estate by *purchase per formam doni*, viz. by the limitation in the marriage settlement; and this estate-tail preceded the remainder in tail to *Rooke* and *Ash*, and the reversion in fee, which was in himself; therefore the point is, whether the tenant in tail by purchase who suffered a recovery to the use of himself in fee is to be considered in the same manner as if he took an original estate in fee *ex parte maternâ* by descent.

After considering the nature of estates-tail before the *stat. de donis*, and since, and the operation of common recoveries, the court resolved that in the case at bar by virtue of the common recovery *Jacob Banks* gained a new estate in fee to him and his heirs general, and thereupon judgment was given for the defendant: error upon this judgment was brought *in domo procerum*, and the 17th of April 1744. *Willes C.* Justice delivered the unanimous opinion of all the Judges in favour of the defendant *Strachan*, and judgment was accordingly affirmed, *Post*.

Sercole *versus* Hanson, Bart. B. R.

WRIT of error was brought to reverse an outlawry in an action for a debt of 400*l.* and the error assigned was that the party outlawed was beyond sea at the time of the *exigent* awarded; and now serjeant *Draper* moved that the outlawry might be reversed upon filing common bail, for that no affidavit was made and filed according to the statute of the 12th of *Geo.* 1. nor no writing or indorsement of any sum on the back of the writ, and therefore if the sheriff could have found the defendant, he could not have arrested him by virtue of such process, but only could have served a copy of it upon him.

Outlawry.

Special bail is required upon reversing an outlawry.

2 *Stra.* 1178. S. C.

Mr. *Lacy contra* insisted that the party outlawed ought to put in special bail before the outlawry be reversed; as the law stood before the statute of *W. & M.* every defendant outlawed was to appear in person before such outlawry could be reversed, and such appearance was a commitment in custody, viz. he was to be in prison to answer the plaintiff's action, *Shep. Epitome* 1079. in cases of pardons of outlawry if after judgment he must pay the debt, if before judgment

4 & 5 *W. & M.* c. 18. s. 3.

ment he must yield his body to prison, &c. and the reason in pardons of outlawry and in reversals of outlawry is the same, *Lit. Rep.* 301. *Salk.* 496. *Carth.* 459. *Matthews v.* ——— there, (though the defendant never was in *England*) the court would not reverse the outlawry, but put him to bring error and put in bail, and there is a note at the bottom of that case, that this is an excellent way to get bail of a foreigner, *Cases in King Wms. time* 549. *Wilbram* and ——— *Trin.* 1701. in error to reverse an outlawry in *C. B.* upon the reversal of the outlawry it was resolved that the defendant should put in special bail if the action required it; if the court in the case at bar do not oblige the defendant to give special bail, defendant being abroad, the plaintiff will lose his debt which is 400*l.* of which we have an affidavit now, though there was none at the time of suing out the first process.

Draper replied, that before the statute of *Eliz.* outlawry would not lie only in actions of trespass *vi & armis*; want of proclamation was error at common law; the case in *Salk.* 496. is in point with us.

31 *Eliz. c. 3.*
f. 3.

C. J. Lee: By the statute of *Eliz.* the bail is to pay the condemnation money. *Salk.* 496. is an express case in point that special bail shall be given where the action is bailable; in *Martin and Duckitt*, *Trin.* 6 *G. 2.* and *Wall and Wotton*, *Pass.* 12 *G. 1.* there was special bail in both these cases upon error to reverse the outlawries; and in the case at bar the defendant in *Easter* term following put in bail special, and the outlawry was accordingly reversed.

Lyddall & al' Executors of Metcalf *versus* Dunlapp & al' Executors of Felton.

Whether
plene admini-
stravit be a
good plea in
covenant a-
gainst execu-
tors where
the breach is
for non pay-
ment of rent
incurred in
their own
time.

ACTION of covenant, the breach was assigned for non-payment of rent incurred in the defendant's own time, *plene administravit*, and general demurrer to the plea; the question was, whether this was a good plea, and Mr. *Lawson* against the plea cited 5 *Rep.* 31. *Popham* 120. 1 *Vent.* 271. 1 *Bullst.* 22. 1 *Mod.* 185. *Salk.* 297. 316, 17. Mr. *Poole* in support of the plea, said that this question depends upon what judgment the court can give upon this plea, and the plaintiff here can only have judgment *de bonis testatoris*, *Rol. Abr.* 931. p. 8. *Dyer* 324. *Cro. Jac.* 671. *Hob.* 188. 1 *Saund.* 112, if judgment can only be given *de bonis testatoris*, then *plene administravit* will be a good plea, as a temporary bar; all the cases cited by Mr. *Lawson* are in actions of debt, and the case in *Salk.* 316. is with the defendant, he admitted that the plaintiff might have brought his action against defendants as assignees of the term in debt both in the *debet & detinet*, and that in such case the de-
fendants

defendants would be chargeable *de bonis propriis* without naming them executors.

C. J. Lee: None of the cases cited by Mr. Lawson come up to the case before us, the question depends singly upon what judgment can be given in this action: there is no doubt but defendants might have been charged as assignees of the term, if no other judgment can be given but only against defendants as executors, then this will be a good plea; Justice Dennison cited *Allen* 42. and said he had seen the roll in the case in *Salk.* 316. *Ulterius concilium.*

Thrale *versus* Vaughan. B. R.

DEBT upon bond, oyer of the condition was, that if defendant should indemnify plaintiff for what beer and ale he should deliver to one Stokes, then the bond to be void; plea, that the plaintiff delivered no beer to Stokes after the making the writing obligatory; replication, that he did deliver beer to the said Stokes to such a sum; general demurrer and joinder.

Mr. Ford objected to the replication, that it did not appear thereby that the beer was delivered before the filing the bill. *Lut.* 407.

Mr. Poole in support of the replication said that it tendered a good issue, and if defendant had taken issue, the merits might have been tried.

C. J. Lee: It would have been better to have said, "*before filing of the bill;*" but as this is upon a general demurrer, and is only matter of form, Judgment for the plaintiff.

Brown *versus* Seymour. B. R.

ACTION of trespass, assault and mayhem, plea, *son assault de mesne* tried before Justice Burnett last Lent assises; the jury found a verdict for the plaintiff and damages 150*l.* and now it was moved to increase the damages. Mr. Justice Dennison certified to the court from his brother Burnett that the evidence at the trial was, "that plaintiff was entertained by defendant at his house in June 1741. and had been so for three years before that time, that plaintiff and defendant being drunk together had a great many words, plaintiff struck defendant and used him very ill, upon which defendant turned plaintiff out of his house, plaintiff coming back again for his great coat, defendant took a gun and shot at plaintiff and wounded him, so that he lost three fingers of his left hand: C " the

Malhem.
Court has a
discretionary
power to in-
crease the
damages in
this action.

“ the jury considered the provocation and gave only 150*l.* damages, “ and J. *Burnett* said he was satisfied with the verdict.” Mr. *Lloyd* shewed cause why the damages ought not to be increased, and objected that damages could not be increased upon the declaration in this case, which is only general for an *assault, battery and maihem*, without any particular description of the *maihem*; and cited *Dyer* 105. and said it should have been laid for maiheming his left hand, whereby he lost three fingers. *Stiles* 345. 1 *Sid.* 108.

Gundry for plaintiff: It is laid in the declaration that defendant did assault and maihem him in the left hand, and that is particular enough. 1 *Leo.* 135. *Lit. Rep.* 150. *Latch* 223. *Hooper* and *Pope*, *Hard.* 403.

C. J. *Lee*: There is no doubt but the court can increase the damages in this case even upon view of the party maimed; as to the cases cited they can be of no use to direct the court, because every case of this kind depends upon its own circumstances, 1 *Sid.* 109. though it does appear that plaintiff has received great damage, yet to determine this case the court must take into consideration the whole circumstances of it; it appeared at the trial there was great provocation given by the plaintiff, and the behaviour of the plaintiff is material to be considered; I think the same as the jury and the judge who tried the cause have done, and that 150*l.* is a great sum, and enough in this case, as it now appears to us, 1 *Rol.* 572. 14 *Jac.* *Baynes* and *Haddock*, for mayheming and knocking out an eye, this court only increased the damages from 11*l.* to 50*l.* So the rule was discharged.

Tomlin *versus* Burlace. B. R.

For plaintiff
in error.
Rast. Ent.
250.
Yelv. 112.
2 Cro. 202.
2 Salk. 520.
6 Rep. 24. b.
Mod. 551.
S. C.

IN error from the court of *Rocheſter*; debt upon an obligation; plea *per duritiam*; replication that defendant was at liberty, and made the bond of his own free will; and that he made it not for *fear* of imprisonment, and concludes to the country; verdict for the plaintiff; and now upon the common errors assigned it was insisted for plaintiff in error *per* Mr. *Lawson*, that the replication was bad, because it was rather a replication to *per minas* than *per duress*; and he cited the cases in the margin; *Gundry* for defendant in error said, the old way of pleading was, that every issue must consist of an affirmative and a negative, but that is now got over. 1 *Inst.* 126. and an issue now, may be of an affirmative upon an affirmative; as if defendant pleads he was born in *France*, and plaintiff replies he was born in *England*, this is a good issue; if the lord avows for rent-service, and the plea in bar be, that the distress was made out

out of the avowant's fee, and the replication that it was within; is a good issue. *Rastall* 555. *b.* the issue upon *plene administravit* consists of two affirmatives, so the issue in a writ of right. But supposing this replication is informal, yet it is good after a verdict, and helped by the *stat. 4 & 5 Ann.* and so it was adjudged *per totam curiam*, and the judgment affirmed.

Bro. Issue joined.
Rastall Attaint 89.
3 Leo. or Lev. 209. Knight and Norton.
Hob. fo. —
Ed. 4.

Bro. tit. Issue p. 6. Sir T. Jones fo. 6. — *v.* Tomlinson. 1 Show. 250. cited per J. Dennison.

Rex versus Norman. B. R.

NEWMAN an attorney, who was a commissioner to take affidavits in B. R. upon an arbitration to end some matters in difference between two persons upon an indictment in this court examined several persons *ore tenus* upon oath, without putting the matter into writing. *Per tot' cur'*, This is such an offence for which an information must go. *Lacy pro qu. Gundry pro def.*

Information against an attorney for examining persons on oath upon an arbitration.

Rex versus Jones, Esq; B. R.

RULE to shew cause why an information should not go against defendant a justice of peace *pro com' Midd'*, for demanding one shilling of J. S. who was brought before him, which defendant insisted upon as his due, for what he called discharging his warrant; and upon refusal to pay it, he sent J. S. to the new prison; upon shewing cause this matter was denied, and so the rule discharged, otherwise the court would have granted the information.

Information shall go against a justice for committing a man for not paying 1 s. for discharging his warrant.

Havers versus Bannister. B. R.

POOLE moved to strike out of the declaration eight hundred pounds, and to insert the words eight thousand pounds in case upon *assumpsit*; after plea pleaded, every thing being in paper, the court granted the motion.

Amendment of declaration after plea. —

Easter Term

16 Geo. 2. 1743.

Sir Henry Hartop *versus* Hoare & al'. B. R.

Bailment.
A market
overt cannot
be for pawn-
ing, and the
court cannot
take notice of
the custom of
London un-
less it be
found.

2 Stra. 1187.
S. C.

TROVER for certain jewels; upon Not guilty a special verdict was found, *viz.* That plaintiff being owner of the goods in the declaration, 12th *January* 1729. inclosed them in a paper sealed up, and also sealed them up in a bag with his own seal, and in that manner, sealed up, lodged them with one *Seymour* a jeweller and banker in *Fleet-street*, for safe custody only, from whose servant the plaintiff took a receipt acknowledging the receipt of the said jewels for the use of his master *Seymour*, to keep them for the plaintiff, and to redeliver them to him on demand, so sealed up as afore-said; that *Seymour*, without the knowledge, privity or consent of the plaintiff broke the seal, and carried the jewels to defendant's shop, who are also jewellers and bankers in *Fleet-street* in the city of *London*, and traded in jewels, and in the open shop pledged them as his own property for 300*l.* and also gave a note of his hand for the money without any authority from the plaintiff to sell or dispose of them; that the defendants have converted them to their own use; that *Seymour* continued in possession of the said jewels till the time he pledged them; that *Seymour* afterwards became a bankrupt, and plaintiff brought this action for the jewels in the Common Pleas, and upon this special verdict judgment was there given for the defendants; but now upon error brought the Ch. Justice gave judgment, after several solemn arguments at the bar and the bench, as follows:

The general question upon this verdict as found, is, whether the plaintiff is barred from having the jewels re-delivered, or from having satisfaction in damages.

4 Rep. 83.
Moor 248.
Salk. 655.

The plaintiff's delivery was a naked bailment to his own use, and there was no authority given afterwards to dispose of them, so that *Seymour's* breaking the seal made him a trespasser to *Hartop*.

2d Q. How far plaintiff is affected by what has been done by *Seymour*, and whether plaintiff's property be divested by this act? and we are of opinion that *Seymour* had no property general or special; it is true they originally came by right to him, but when he broke the seal he became a possessor *malâ fide*; it was urged at the bar that it was more reasonable that the plaintiff who trusted *Seymour* should suffer, than the defendants, who put no confidence in him; like the case of *Hern v. Nichols*, in *Salk.* 289. but that case is not like this, here the plaintiff used his utmost prudence by sealing the bag, and his particular caution in taking a receipt, and gave no power to *Seymour* to do any thing that might occasion this deceit. 1 Inst. 89.

As there seems to be no fault on either side, either in respect to the plaintiff or defendant, it will be necessary for us to see how this case stands at the common law exclusive of the custom of *London* as to a market overt; and this disposition of the jewels in a banker's shop is by no means a divesting the plaintiff's property. *Moor* 624. *Cro. Jac.* 49. 35 *H.* 6. 29. *Bacon's use of the law*, fol. edit. 80. 5 *H.* 7. 15. by the state of these cases it was never apprehended that the true owner lost his property in the goods by a possession, unless they were disposed of in a market overt, and no regard was had to the vendee's coming in as a purchaser without notice, *Vide 2 Inst.* 713. 718. the cases cited for the defendants to impugn this rule are *Carth.* 357. *Salk.* 344. 126, 125. but surely property does not always follow the possession, unless the thing lost has no mark by which the owner may know it, as in the case of money, *Cro. Eliz.* 746. *Salk.* 283. *Bank of England* and *Newman*, a bank note payable to *A.* or bearer, payment to one who finds a bank note is so far good that it discharges the bank.

3d Q. Whether the place where these jewels were pawned will intitle the defendants to keep them till they are re-paid their money? It is found that the defendants often lent money upon jewels in this publick open shop; and it is argued that by the custom of *London*, every open shop in the city is a market overt in respect to those sorts of goods they trade in; and this has been much insisted on for the defendants, and that pawning is within that custom; but we cannot take judicial notice of such a custom on this verdict which has not found it. *Carth.* 75. *Salk.* 125. *Trin.* 5 *Geo.* 1. *Argyle* and *Hunt*, on a prohibition it was determined the court could not take notice of the custom of *London*, this was for words. But taking it that the custom of *London* would extend to sales, then a question will arise whether a sale and a pawn are the same, for unless they are, the custom would not have availed the defendants in this case if it had been found, *Perk.* 435. 1 *Sid.* 135. *Noy's Max.* 28. *Lamb. Customs of Kent* 619. 2 *Sid.* 139. *Jenk.* 83. 35 *H.* 6. 25. *Jenkins* was a learned Judge, and there is no instance wherever this

D

custom

custom has been allowed as to pledges; it is objected that this finding is by a jury who cannot try it but by the mouth of the Recorder; this is contrary to *Cro. Car.* 517. *Cro. Jac.* 69. *Hob.* 86. *Jones* 412. this custom is unreasonable, (to shew which he cited) *Jenk.* 83. *stat.* 1 *Jac.* 1. c. 1. is very material, but we are all of opinion that the plaintiff has a good right to recover without the aid of that statute; accordingly the court gave judgment for the plaintiff *Har-*
top.

Sadlers Company and Badcock Trustee of the Hand
and Hand Fire-office. In Chancery.

Insurance.
The party
insured ought
to have a
property in
the thing in-
sured at the
time of the
insurance
made, and at
the time of
the loss, or he
cannot be re-
lieved.

MRS. *Strode*, lessee of a house, insured the same for seven years from fire, to the value of 400*l.* her term therein expired (before the policy), viz. at *Midsummer* 1740. on the 6th of *January* following the house was burnt down; on the 23d of *February* following Mrs. *Strode* assigned the policy to the plaintiffs, who are the ground landlords, and now a bill is brought against the insurance-office for the 400*l.*

Lord Chancellor: The question is, whether by the assignment the plaintiffs are intitled to recover the 400*l.* And I am of opinion that the party insured ought to have a property in the thing insured at the time of the insurance made, and at the time of the loss by fire, or he cannot be relieved. Mrs. *Strode* had no property at the time of the fire; consequently no loss to her; and if she had no interest, nothing could pass to the plaintiffs by the assignment.

Interest or no interest must be inserted in policies of insurance of ships, or the insured must prove he had interest on board.

If the insured was not to have a property at the time of the insurance or loss, any one might insure upon another's house, which might have a bad tendency to burning houses. Insuring the thing from damage is not the meaning of the policy, it must mean insuring Mrs. *Strode* from damage, and she has suffered none.

See Cases in
Parliament,
where a fire
happened in
1721.

Bill dismissed without costs.

The King *versus* The Bishop of London. B. R.

THIS was a motion for a *mandamus* to the Bishop of London to ^{2 Stra. 1192.} grant a license to the Reverend Mr. *Dawney* to preach as lecturer of the parish of *St. Ann Westminster*, for that by the statute of ^{S. C.} ^{13 & 14 Car. 2.} uniformity of *Car. 2.* no one can preach as lecturer of any parish without a licence from the Bishop.

The principal facts that appeared upon the affidavits on both sides were these; that in *November* last Dr. *Thomas* the late lecturer resigned the lectureship, which being so vacant the select vestry consisting of a few persons, chose one Mr. *Church* lecturer, who was admitted by the rector Dr. *Pelling*, to preach as such, and received by the parish; afterwards some of the parishioners being dissatisfied with the election of Mr. *Church*, proposed to put in one Mr. *Dawny*, and a roll or paper was carried about the parish, from house to house, which was signed by 520 parishioners, who approved of, and thereby elected Mr. *Dawney* lecturer, and as the lecturer is supported merely by the voluntary contributions of the inhabitants, and as no temporal benefit or certain stipend was settled on such lecturer, several of the principal persons who signed the said paper, waited upon the Bishop, desiring he would license Mr. *Dawny*, which was refused by the Bishop, Mr. *Church* having before been chosen by the select vestry, consisting of a few persons, and admitted and received by the Rector Dr. *Pelling* and the parishioners. And now cause was shewn why a *mandamus* should not go to the Bishop to grant the licence as aforesaid.

Mr. *Gundry* of counsel with defendant: Supposing Mr. *Dawney* to be duly elected, which I do not admit, yet I apprehend the Bishop is the proper judge whether he shall be licensed as a fit person to preach; what is a *mandamus*? it is a writ to admit one into an office to which he has a right, or to restore him to one, from which he has been wrongfully displaced; there is no such office as a lecturer known in the law, there is no other incumbent except *vicar* or *rector*; the *rector* may hire a lecturer if he pleases, and he may preach, for the freehold of the church is in the *rector*, and by the constitution of the church the *rector* is not obliged to preach, only to read a homily; in this case there is no temporal profit arising to the lecturer in certain, only a voluntary contribution of the parishioners, and therefore it is no office. What a mandamus is.

But supposing it could be called an office, yet as preaching is merely spiritual, the Bishop is the proper judge whether the person chosen be a fit person to preach; in an institution to a benefice the
bishop

bishop acts as a judge, and so it was determined in parliament cases between the Bishop of *Exeter* and *Beal*; it cannot be tried by a jury whether Mr. *Dawney* be a fit and proper person to preach. 2 Inst. 631, 2. 5 Rep. *Specott's* case. I do not know that there ever was a *mandamus* to the Bishop to institute to a church; and I question whether the rector might not bring an action against any person the Bishop shall license to preach as lecturer, if such person should go into the pulpit and preach without the leave of the rector, in whom the freehold is.

By the canons no person can preach unless admitted by the Bishop, and the canons bind the clergy in spiritual matters, and the statute of uniformity is only a confirmation of the canons in this matter. There is a *caveat* entred against Mr. *Dawney* in the spiritual court, and where a matter is in controversy in the proper court, this court will not interpose; as in the case of 5 Mod. 374, 375. and in *Trin.* 2 G. 2. where a *mandamus* was moved for, to license one *Wallis* to teach school at *Hackney*, it was refused because a *caveat* was depending. A *mandamus* to swear a deputy register of the consistory court of *York* was refused because there was a matter in the case in controversy in *Canc.*

In the case of *The King* and *Rodes*, indictment for forgery, at *Nisi prius*, the trial was put off, because the validity of the will was depending in the court of delegates.

In the case of *Con. Phillips* in a motion for an attachment, the court would not interpose, because the validity of her marriage was pending in the spiritual court, as touching some matter about the contempt.

And in *Pas.* 13 Geo. 1. Mr. *Vincent* was chosen lecturer of *St. Dunstan's* parish, where there had been a lectureship time out of mind, and land given to trustees to be applied to the lectureship; a licence was applied for, but refused by the Bishop, and upon application for a *mandamus* this court would not grant one, because, some matter relating to this lectureship was then under litigation in the court of Exchequer; in this case, though there was land belonging to the lectureship, yet the court said the Bishop had the discretion to grant a licence or not.

Electors how to be. Serjeant *Wynne* on the same side; Mr. *Dawney* cannot be said to have a majority of the persons paying to church and poor on his side, there being in this parish the number of 1130 of such persons; besides, his election in the nature and manner of it is void, for it is laid down that in elections, the consent of the electors must be given at one and the same time, *Simul & Semel*, *Davis's Rep.* 48, Sir

Sir John Strange insisted on the behalf of Mr. Dawney, that a *mandamus* ought to go to the Bishop; that in the parishes of St. Clements, Covent Garden, and St. Giles's, the select vestry do not choose the lecturer, although the select vestry does in the parishes of St. James, St. George Hanover Square, and St. Martins in the fields; but they derive that power under the express words of an act of parliament.

It is objected that Mr. Dawney was not duly elected, because no notice of such election was given in the church; our affidavits answer, that the churchwardens would not let notice be given; it is also objected that our affidavit does not say that 520 are a majority, and that a lecturer is no officer, and that the law knows no such office, but the act of uniformity mentions such an office, also the 1 Codex, fol. 65.

When an act of parliament gives power to a particular person, to do some particular thing, as in the case of a justice of peace, this court will grant a *mandamus* to a justice to execute an authority given him by a statute commanding him to determine such or such a complaint which has been laid before him.

A *mandamus* lies to the ordinary to grant administration, 1 Sid. 281. 2 Sid. 114. this court obliges him to execute the authority given him; not how he shall execute it.

In the case of *The King and The Mayor of Canterbury*, the mayor had authority in him to grant a certificate, and a *mandamus* was granted to oblige him to grant a certificate to one who was intitled to it. Mich. 1 G. 1.

In the case of a school-master *The King v. The Bailiffs of Morpeth*, *mandamus* to the bailiffs to license a school-master, Trinity 3 Geo. 1.

The King and Dean and Chapter of Dublin, Hil. 7 Geo. 1. *mandamus* to admit Mr. Dowgate to a stall in the cathedral of Dublin.

The King and Dean and Chapter of Norwich, *mandamus* to admit Dr. Sherlock, Master of Catharine Hall, a prebend of Norwich, Trin. 4 Geo. 1. *The King v. Bishop of Salisbury*, the like to admit Mr. Clarke.

In Trin. 9 Geo. 1. Dr. Bentley's case, a *mandamus* was granted to admit Dr. Bentley to his accademical degrees.

And if the rector can refuse the pulpit to whom he pleases, he may object to whomsoever the parishioners may choose; there are various facts objected which the court now has no occasion to determine, but when the *mandamus* is returned, the court will then see what they put it upon.

Mr. *Floyd* on the same side for Mr. *Dawney*: The select vestry have refused to let notice be given in the church of the election, and now they come and object to our manner of election; why does any one present to a living? The reason is, because the law supposes every one who has the presentation is the founder; we are the persons who are to pay Mr. *Dawney*, therefore the reason is strong that we ought to have the right of choosing him.

A *mandamus* will lie to a court leet to do a particular act.

When rectors
and vicars
were first in-
stituted.

There never was a *rector* before the council of *Lateran*, nor a *vicar* till the time of King *John*, and a *lecturer* may be more antient than either of them for ought I know; however, they are taken notice of in the *stat. Car. 2.* as to these licences.

Right of bi-
shops to grant
licences to
marry.

A *mandamus* was granted to admit Dr. *Bland* provost of *Eaton*.

1st of *December* 1735. in Chancery, a question arose before my Lord *Talbot* as to the right of bishops to grant licences to marry; Lord *Talbot* said as they were taken notice of in the stamp-act as to this right, it would be too much for him, not to take notice of such a right, when the same was taken notice of by the legislature.

In *Hil. 3 Geo. 2. The King v. Ward.* Motion for a *mandamus* to the Archbishop of *York* to admit one ——— deputy register, (I think), Dr. *Sharp* had appointed one *Shaw*, his deputy, *Shaw* applied to the delegates; then a question was, whether a *mandamus* would lie for a spiritual officer, and a deputy only, and a *mandamus* was granted.

Mr. *Jones* on the same side cited 1 *Vent.* 187. 1 *Palmer* 51. 5 *Mod.* 374. (not applicable to this case), and said that this question depended upon the act of uniformity, no action will lie against the Bishop for refusing this licence, and if it would lie, it would only be for damages; Mr. *Dawney* could not thereby recover the lectureship.

Mr. *Gundry*'s reply to some of the cases cited; he said that the case of a register to the Bishop's court was a temporal benefit, and that an ejectment would lie for a prebend's stall, or an assize will lie; after he is admitted ejectment lies, it is a freehold; as to the case

case of a school-master every man by the common law has a right to follow the business he is brought up to; as to the case of Dr. *Bland* the question there was, whether the Dr. had a negative voice; the *mandamus* was for him to put the seal to a presentation, and that question was merely triable in the temporal courts.

Lee Chief Justice, after taking time to consider of this case, delivered the opinion of the court.

It appears by the affidavits on both sides of this motion, that 23 persons of this parish met at a vestry at *St. Ann's Church*, and chose Mr. *Church* lecturer, and that he has been received as such, both by Dr. *Pelling* the rector, and great part of the parish.

It also appears that after this, a paper was carried about the parish, and signed by 520 persons who have named and approved of Mr. *Dawney* for their lecturer, and that he has not been received by the rector or minister of the parish, and the Bishop of *London* has refused to give him a licence to preach;

It appears that this parish has no fixed stipend for a lecturer, but merely depends upon the voluntary contributions of the inhabitants; nor does it appear that there is any certain custom as to electing a lecturer. Therefore as there is no certain custom, nor does it appear that either of these persons Mr. *Church* or Mr. *Dawney* have a demand of one penny from any parishioner or any body whomsoever, but that the contribution to a lecturer is merely voluntary, the question is, whether this court will at all interpose in this matter, and we are of opinion there is no foundation at all in this case to ground any right upon.

The ground whereupon application is made to this court is upon the statute of uniformity, whereby all persons are forbidden to preach as lecturers, without a licence.

It is true, that it is not in the Bishop's power to withhold his licence whenever he pleases, but if he should grant it in this case to Mr. *Dawney*, and Dr. *Pelling* the rector should refuse him the pulpit, such licence would be of no effect, and it is plain the fee of the church is in the rector (*Watson's comp. Incumbent* 709. 2 *Cro.* 366. *Noy* 104.) and he may admit what lecturer he pleases, and has already admitted Mr. *Church*, who is now in possession; here is no temporal right in question, and the parishioners have no right to make such election, as to oblige the rector to admit Mr. *Dawney* lecturer into the pulpit. *Mich.* 12 *W.* 3. in *Holt's Reports* (a book of no authority) cited as a case in point, whereof my Lord Chief Justice said he had seen a more accurate report. The rule to shew cause why a *mandamus* should not issue discharged.

Thoresby

Thoresby *versus* Sparrow. B. R.

Oyer not to
be dispensed
with though
shewn to be
lost.

1 Saund. 8.

Salk. 498.

2 Lutw. Sym-
son and Gar-
fay.

2 Stra. 1186.

S. C.

5 Rep. Wy-
marsh's case.

Lyfford's case.

6 Mod. 154.

Foxon and
Moseley.

1 Mod. 266.

IN an action of covenant upon a lease, defendant prayed *oyer*; plaintiff made affidavit that he had searched for the lease and could no where find it; and now it was moved thereupon that the court would dispense with the *oyer*, that the plaintiff had not the original lease but only a copy, and was willing to give defendant a copy thereof; but *per curiam*, this business of *oyer* does not depend upon the rules of the court, but the defendant has a right to it by law, and it would be error if the court should deny defendant *oyer*, as the plaintiff has declared upon the deed, and made a *profert* thereof; for now it is supposed to be actually in court, how then can we deny it; if any thing can be done for plaintiff in this case, it must be by helping plaintiff in declaring, and there, upon proof that the original lease is lost, a copy may be given in evidence, and plaintiff might have declared in debt without setting forth this deed; but wherever an action is brought on a deed, charging defendant with the execution of it, the plaintiff must there bring the deed into court; the reason is, that the court may see whether it be executed according to law; and we had better suffer a private mischief than a public inconvenience; the rule to shew cause why *oyer* should not be dispensed with, was discharged, *per C. J. Lee. Wright and Dennison, absente Chapple.*

Smith *versus* Nicholson. B. R.

Practice.

6 Mod. 130.

2 R. A. 490.

Salk. 321.

Plaintiff can-
not call for a
return of a ca.

fa. pending

error.

2 Stra. 1186.

S. C.

See 2 Stra.

867.

A *Ca. fa.* was taken out the 3d day of *December* and left in the sheriff's office, the same day in order to have *non est invent'* returned thereon, to ground proceedings against the bail, which was afterwards done; a writ of error was allowed the 4th of *December*, and notice thereof given, notwithstanding which, proceedings were had against the bail; and now upon Sir *John Strange's* motion to set aside the proceedings on the *sci. fa.* against the bail, the question was, whether this writ of error was a *supersedeas* to the *ca. fa.* on the 4th of *December*, the sheriff not having then executed it; and *per cur'* it is a *supersedeas*; but if the execution had been executed before the allowance of the writ of error, the sheriff might return it afterwards, so the proceedings on the *sci. fa.* against the bail were set aside. *N. Pas. 9 Geo. 1. Oldridge and Stroude*; 2d *sci. fa.* returnable 13th of *May*, same day error brought, and the *sci. fa.* returned and held right.

Witcher *versus* Chessam. B. R.

WITCHER was sued in the spiritual court for disturbing a person in his seat in the church, and now suggested for a prohibition that he purchased an ancient house with this seat belonging to it, to him and his heirs, which was pleaded below. *Per cur'*, This is enough to shew the temporal right is in question; and a prohibition was awarded.

Prohibition.
Poph. 140.
2 Roll. Ab.
188.

Jervois *qui tam versus* Hall. B. R.

QUI tam upon the game act for killing a hare, verdict for defendant; motion for a new trial, because the Judge who tried the cause refused to admit a person to be a witness, who was a parishioner of the same parish where the hare was killed; but C. J. Lee said, he did not remember that ever a new trial had been granted in the case of a penal action; and so *per cur'*, the motion was refused.

No new trial
in a penal ac-
tion.

Middleton *versus* Price & al'. B. R.

ACTION of imprisonment; the defendants jointly justify under process *ore tenus*, issuing out of an inferior court, according to the custom thereof; demurrer and joinder; and it was objected by Draper serjeant for the plaintiff, that this is said to be a court of record, and the process is said to be by word of mouth, how therefore can it be tried? it is not said that any summons was awarded by the court, it is not said that it issued out of the court, it does not say that it was commanded by the court, nor is it said to be executed at the request of the plaintiff therein; it does not alledge that the officer returned the process; plaintiffs in inferior courts are obliged to do their duty; the *stat. 12 Geo. 1. c. 29.* requires an affidavit of a debt of 40s. or upwards to be made; here was none, and though this custom of *ore tenus* process might be good, yet this statute is a repeal of it. Serjeant Wynne *econtra*, I admit, if the plea is bad as to one, it is bad as to both defendants, because they have both joined in the same justification; the strongest objection seems to be, that the officer does not, by the plea, shew, the return of the process, and that wherever officers justify under process, they must shew that the process was returned. 9 Co. 67. 1 Roll. 557. p. 4. (but *nota*, I did not hear serjeant W. give an answer to this objection). Lee Ch. Justice: This appears to be an arrest upon *mesne* process; a plaint was levied, then a summons issued, then a *capias ore tenus*, and to that there is no return at all;

1 Salk. 409.
2 Roll. Ab.
563. f. 18,
8, 9, 10.
Justification
under process
must shew it
was returned.
2 Stra. 1184.
S.C.

Sir T. Jones
23. 53.
Thomson's
Entr. 343.
Cro. Car. 259.
2 Roll. 672.
1 Brownl. 204.
9 Rep. 63.
Lutw. Pool
and Wynn,
Hob. 63.

when an officer justifies under process that is returnable, he must shew that he has done all that was his duty to do; this being *ore* *tenus*, can make no difference; and indeed, as brother *Draper* says, I do not see how this can be tried; there is some weight in the other objection, what time the summons was given to the officer does not appear, but these are sufficient reasons for the court to give judgment for plaintiff, and he had judgment accordingly.

Trinity Term

16 & 17 Geo. 2. 1743.

Rex *versus* Grosvenor. B. R.

Rex *v.* Shalkleton of city of York, Hil.

8 Geo. 2.

2 Vent. 243.

Rex *v.* Larwood, 4 Mod. Comb.

2 Ld. Ray.

1354.

2 Mod. 299.

Stat. 1 W. & M. c.

Rex *v.* Pitt,

Trin 5 Geo 1.

Act of toleration.

Act of corporations, 13

Car. 2. ft. 2.

cap. 1. sec. 12.

Carth. 14, 15.

Saund. Green

and Cole.

N. It might

be tried in an

action.

2 Sta. 1193.

S. C.

UPON a motion for an information against *Grosvenor* for refusing to serve the office of one of the sheriffs of *London*, it appeared by affidavits that he had been duly elected thereto, and that he refused to give a bond to serve and enter upon the said office; on the other side it appeared that the defendant is a protestant dissenter, that he has qualified himself in all things according to the act of toleration, but in his affidavit he has said that it is against his conscience to take the sacrament according to the rites of the church of *England*; it also appeared that there is a by-law whereby large sums of money have been taken of several persons by way of fine for refusing to serve the said office, amounting to 35000*l.* in a little time; *per cur'*, this is a doubtful question, and a matter of very great consequence, and we will not interpose to have this matter tried in a criminal way, when it appears that the city have another, and *that* a civil way of obliging persons to serve this office; and this case differs from the case of *Larwood*, for it does not appear that in that case there was any by-law or other way of enforcing the election than by application made to this court, so the rule to shew cause why an information should not go was discharged. *Per Lee, C. J. Wright and Dennison, absente Chapple.* Sir *John Strange*, *E. Bootle*, and *Urlin* serjeant and recorder.

corder of *London, pro rege*; *Floyd, Hume, Leeds* serjeant, and *Draper* serjeant for defendant.

N. A case cited by *Leeds* serjeant, *Rex v. School*, *Mich. 2 Geo. 2.* Upon a motion for an information for a misdemeanor, the affidavits charged that defendant procured one *Reed* to burn some writings of an estate of great value, and that defendant forged another writing of the same estate, but this, though so great a crime, appearing to have been done three years before, the court refused the information.

N. A case cited by *Draper* serjeant, *Rex v. Fish*, *Trin. 5 Geo. 1.* Motion for information against three or four persons, suitors of a county court for disturbing the court in choosing a verderor, the question was, whether the suitors or the sheriff had authority to adjourn the court; this court determined that the sheriff had the legal authority, yet because there was no breach of the peace, and it arose from a mistake in judgment; this court refused to grant the motion, though they were against the defendants as to adjourning the county court.

Thrale versus Vaughan. B. R.

DEBT upon bond, with condition that if defendant should indemnify plaintiff for what beer he should deliver to one *Stokes* then the obligation to be void, and judgment for plaintiff after demurrer; upon a motion to set aside *fi. fa.* a writ of error being brought, but no bail to the writ put in, it was objected for plaintiff that this bond was within the *stat. Jac. 1. c. 8.* and that bail should have been put in before execution could be staid. But *per cur'* this is not a bond for payment of a certain sum of money, and this statute ought to be construed strictly, and the *fi. fa.* was set aside.

Ante. 5.
Yelv. 227.
1 Lev. 117.
Spinks and
Bird, Barnes's
Notes 66.
2 Bull. 54.
1 Keb. 613.
Carth. 28, 9.
Comyns 321.
On what
bonds there
shall be bail
in error.
2 Stra. 1190.
S. C.

Pitts versus Carpenter. B. R.

ACTION upon the case; defendant pleaded a set off, and upon the trial the plaintiff proved there was due to him from the defendant 4 *l.* 15 *s.* 3 *d.* and the defendant proved the plaintiff owed him 3 *l.* 2 *s.* so that the balance due to the plaintiff was only 1 *l.* 13 *s.* 3 *d.* for which he had a verdict.

A set off reducing the plaintiff's demand under 40 *s.* doth not affect the jurisdiction of this court.
2 Stra. 1191.
S. C.

And now it was moved by Mr. *Morton ex parte def'*, that he might have leave to enter by way of suggestion on the roll, that plaintiff and defendant were both citizens of *London*, and that the

Bursfield and
Soams, Pas.
11 Geo. 1.
and in Hick-
man and Col-
ley, Pas. 12
Geo. 2. where
the sum reco-
vered does not
exceed 40 s.
it has been
construed to
be within the
stat. Jac. 1.
viz. when it
appeared at
the trial that
the plaintiff
had no great-
er demand
than 40 s.

the cause of action arose within the city of *London*, and that the verdict being for less than 40 s. it is within the jurisdiction of the court of conscience, which was constituted by *stat. 3 Jac. 1. cap. 15*. But for the plaintiff it was insisted by Mr. *Stracy*, that the plaintiff's cause of action was for 4 l. 15 s. 3 d. and that it was in the defendant's own power and knowledge only what he could prove, or would prove by way of set off; and if the plaintiff had gone to the court of conscience for this demand, and the defendant had thought fit not to have proved any set off, it is plain that the court in such case would have had no jurisdiction; and so it was resolved *per cur'*, and that the demand of plaintiff remains as it did before the statute for setting one debt against another; and if the inferior court should have jurisdiction in this case, it would be very inconvenient; for suppose there are mutual demands of 10000 l. between merchants, and upon the balance there should happen not to be above 40 s. due, *that* court would have jurisdiction in that case as well as in the present, if we should allow this; so the rule was discharged, and plaintiff had judgment. *Per Lee, Wright and Dennison, absente Chapple.*

Seacomb *versus* Bowlney. B. R.

A chaplain to
an ambassa-
dor, if he does
no duty in his
house, shall not
be protected.

DEFENDANT having been arrested by an officer to the sheriff of *Middlesex*, while he was in custody produced a certificate that he was chaplain to Baron *Wafner*, resident to the Queen of *Hungary*, upon which the officer let him go, and the plaintiff having served the sheriff with the common rule to return the writ, it was now moved on behalf of the sheriff to discharge that rule; and upon shewing cause, it was objected by the plaintiff, that though the affidavit swore he was chaplain to the resident, yet it does not say that ever the defendant did duty; and in the case of *Holmes and Gurdon, Mic. 7 Geo. 2*. Defendant insisted on privilege as secretary to the Duke of *Mecklinburgh*, but it not appearing on the affidavits that he did any duty, nor what was the nature of his office, this court held he was not intitled to privilege; the same was determined in the case of *Lockman*, secretary to *Monsieur de Toms*; and *per cur'*, the act of parliament has not given protection to any but *domestick* servants of Ambassadors, and it has always been part of the inquiry by the court what was the nature of the office of every servant; as to the bailiff he had nothing to do but to see whether the defendant's name was entered in the sheriff's office, for if his name was not there, (as it seems it was not in this case) the officer was in no danger by arresting defendant, for the affidavit on behalf of plaintiff swears, that the officer was told that the defendant was not registred, and notwithstanding the bailiff thought fit to discharge him, the sheriff shall return the writ. *Per Lee, Wright and Dennison, absente Chapple.*

Pulling *versus* Reddy & è contra. In Chancery.

IF a legacy be given to *A. B.* upon this condition that she marry with the consent of a third person, and there be no devise over in case she marry without such consent, this is only to be considered *in terrorem*; but if there be a devise over, then it shall go to whom it is so devised over; this rule is taken from the civil law, as this court has a concurrent jurisdiction as to legacies; but if a portion be to arise out of land where there is no devise over, then it shall go to the heir, and the spiritual court has no jurisdiction as to lands; there may be more doubt where money is given to be laid out in lands. *Per Lord Canc. Hardwicke.*

Devise in terrorem.
Cann. v. Cann,
coram Lord
Macclesfield.

Lade *versus* Lade. In Chancery.

LAID down *per* *Ld. Hardwicke* as a certain known rule, that where a man purchases lands in the name of another, it is a resulting trust.

Resulting
trust, what it
is.

Yaw *versus* Leman. B. R.

THE defendant who was landlord to plaintiff, covenanted in the lease to pay the land-tax and save the plaintiff harmless; the premises were taxed at the rate of 150*l. per ann.* but the defendant only had the rent of 120*l. per ann.* and an action being brought on this covenant, it was moved that upon paying land-tax at the rate of 120*l. per ann.* all proceedings might stay, which on hearing counsel on both sides was resolved *per cur'*, although the plaintiff was really taxed at 150*l.*

Landlord who
covenants to
pay land-tax
shall only pay
according to
the rent he re-
ceives, and
not according
to the rent
the premises
are taxed at.

Rex *versus* Richardson and Lacy. B. R.

THE court granted a *mandamus* to two justices to proceed and give judgment in a certain complaint depending before them on the *stat. 11 Geo. 2.* for the relief of landlords, upon the return of the *mandamus* the justices said therein that they had heard and determined the complaint that was before them, and that return was allowed.

Mandamus to
justices to de-
termine a
complaint be-
fore them,
they return it
is determined,
which was
allowed.

Rex *versus* Waite. B. R.

Information
for a libel.

AN information was granted for these words in a letter to the mayor of *Richmond*, viz. "I am sure you will not be persuaded from doing justice, by any little arts of your townclerk, whose consummate malice and wickedness against me and my family will make him do any thing, be it ever so vile."

Rex *versus* Vaughan. B. R.

An attorney
fined 500 l.
and imprison-
ed for taking
200 l. of one
charged with
forgery to let
him out of the
custody of a
tipstaff.

MORGAN, an attorney of *Clifford's Inn* was outlawed for felony in forging a note, and being so outlawed, the prosecutor hearing he was in *London*, applied to *Vaughan* an attorney to get *Morgan* taken up with a Judge's warrant, which was done; and having got *Morgan* in his custody (along with the Judge's tipstaff) took 200 l. of *Morgan* to let him go, for which an information was granted against *Vaughan*, upon which he was tried and found guilty; and now *J. Wright*, (*absente Chapple propter ægritudinem*) pronounced judgment of the court, that this crime was little less than felony, and formerly was punished as such; that *Vaughan* was fined 500 l. and to suffer six months imprisonment, and till he paid the fine.

Anonymous. B. R.

No new trial
shall be where
there was evi-
dence on both
sides, though
a verdict be
against the
judge's opi-
nion who tried
the cause.

ON a motion for a new trial in an action by the owner of the inheritance for making a dam cross an ancient water course, the judge who tried the cause, certified that six witnesses were examined at the trial on each side; that the jury found for the defendant, which was against his opinion, but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides; so a new trial was refused.

Willis *versus* Lewis. B. R.

No occasion
for notice to
appear upon
process served
where the
debt is above
100 l.

IN an action of debt upon bond for 100 l. defendant was served with a copy of the process according to the *stat. 12 Geo. 1.* and it was resolved *per cur'*, that there was no occasion to put the notice to appear at the bottom of the process according to the *stat. Geo. 2.* this being above 100 l.

Olivant *versus* Berino. B. R.

IN trover for some pictures, it was moved that plaintiff should be obliged to take the pictures and costs, upon an affidavit that they are all the goods that the defendant has of the plaintiffs, and that not denied; but *per cur'*, this action is for damages, and you cannot oblige the plaintiff to accept the thing itself.

2 Salk. 597.
Bowen v.
Wright, Hil.
9 Geo. 1.
Q. Freeman
and Black-
burn.
In trover de-
fendant can-
not bring the
goods and
costs into
court.

N. In *Buxton and Gabell, Trin. 9 Geo. 1.* Trover for a ring; and *Pas. 9 or 10 Geo. 2.* in trover for goods, this court refused the like motion.

Long *versus* Miller. B. R.

DECLARATION was delivered within the term; rule to plead was given the 7th of May, and expired the 11th, and no plea being put in, defendant applying for time, but no order made by the Judge, after the time for pleading was out, and before plaintiff had signed judgment, the defendant pleaded in abatement, and the question now was, whether this plea being after the time for pleading was out and a dilatory, should hinder the plaintiff from signing judgment. And *per cur'*, the plaintiff shall have his judgment, for pleas in abatement must be pleaded in four days, if the declaration be delivered before the last four days in term, if in those last four days, defendant must plead after a special imparlance within the first four days of the next term, and this is the practice of the court; and although fair pleas to the action are received after the rules to plead are out, and before judgment at any time, yet dilatory pleas never are, and no court ever favoured them.

Vide rule of
court made
Trin. 1727.
Styl. Reg.
396.
1 Lil. Prac.
Reg. 2.
Cases in K.
William's
time 524.
Practice as to
pleas in a-
batement.
2 Stra. 1192.
S. C.

N. Hil. 13 Geo. 1. *Heath v. Badon*, cited by *Wright J.* Trespass, defendant pleaded after four days were expired, in abatement, and on motion, *cur'* set aside the plea.

Catlin *versus* Catlin. B. R.

DEFENDANT was arrested and held to special bail in an action of trover, upon an affidavit that the value of the goods converted by defendant amounted to more than 10 l. and now it was moved to discharge defendant on common bail; but denied *per cur'*, and there is no occasion for a Judge's order.

6 Mod. 14.
cited per
Wright J.
where defen-
dant held to
special bail in
trover.
2 Stra. 1192.
S. C.

N. Trin. 11 & 12 Geo. 2. *Pitts v. Miller* cited as in point.

Walker

Walker *versus* Jackson. In Chancery.

What words
in a will will
discharge the
personal e-
state, and
charge the
real with the
payment of
debts.
Poll.

BAWPREE Bell the testator, willed that all his estate in *Com' Lincoln'* should be sold for payment of his debts and legacies, then devises to *Emmah Marshall* an annuity of 200 *l. per ann.* to be raised out of his estate, not otherwise in his will engaged in *com' Norf'* to be paid half-yearly; then the will goes on, as a farther mark of his sincere affection, he gives the said *E. M.* several pictures, medals, and other specifick legacies; then he gives to *Margaret Bell* 40 *l. per ann.* charged on his estate in *Norfolk*, and makes *E. M.* and *Dorothy Bawpree Bell* co-executors, and executes this his will in 1740. in the presence of three witnesses; afterwards, on the 21st *August* 1741. he with his own hand interlines in the latter end of the same will these words, (*viz.*) *And I give and devise to them* (meaning his executors) *all my personal estate not herein before devised*, and then re-executed his will in the presence of three witnesses; and the only question in this case was, whether the personal estate should be first applied in ease and exoneration of the real estate?

If personal
estate shall be
first applied to
pay debts, &c.
2 Vern. 718;
568.
Eq. Ca. Abr.
271.
Baddick v.
Lisle, 2 Nov.
1732.
Prec. in Canc.
101. Bamfield
v. Wyndham.
Caf. in Eq.
C. B. Gilbert's
book 73.
Rep. of Caf.
in Eq. 125.
1 Lev. 203.
Feltham v.
Harilton's
Executors.

Lord Chancellor *Hardwicke*: The general rule is, that the personal estate shall be first charged with payment of debts and legacies, and the testator cannot exempt it from being liable to his debts as against his creditors; but as between heir and executor, he may charge them upon any other fund, that is not primarily liable, and discharge the personal estate: there are several ways, by any of which a man may give his real estate for payment of his debts; as 1st, to trustees; 2^{dly}, by way of charge in equity, which this court will decree to be performed, or he may direct that his real estate may be sold for payment of his debts; but let him do it what way he pleases, none of these ways will make the real estate first chargeable, if there be not in the will, either express words, or a manifest intent to discharge the personal estate, but it shall be first liable. And I am of opinion that in this will, there is a manifest intention to give the personal estate to the executors, as a specifick legacy; the will is, that all my estate in *Lincolnshire* be sold for payment of my debts and legacies, afterwards he gives several specifick legacies to defendant *E. M.* likewise gives some pecuniary legacies, and then makes *E. M.* and *D. B. B.* executors, and executes this his will in 1740. this was only making them executors, and if nothing more had been done, the personal estate would have been first liable; but afterwards in 1741. with his own hand he adds the words above, and re-executes the will: this expressly shews he intended to give these ladies some further benefit, and it is much stronger than if these words had been, at first, part of the will; but if they had been there

at first, I should even then have been of opinion it had been a very strong case. This case was very rightly resembled by Mr. *Clarke*, to the Dutcheſs of *Beaufort*'s case; but this is much stronger than any I know, in regard the testator's intention appearing so very plainly by his re-executing his will after the alteration above. (*All the rest and residue of my personal estate*, are the very worst words that can be used in a will to discharge the personal estate, for I have known personal estates made first liable, notwithstanding these words): and so I decree the real estate in *com' Linc'*, or a sufficient part of it, to be sold to pay debts and legacies, &c. *Walker, a bond creditor, v. Jackson* and others, heir and executors of testator, on a rehearing at *Lincolns-Inn Hall*, July 22, 1743.

N. Bromball v. Wilbrabam at the *Rolls* 1724 or 1734. cited by Mr. *Noel* in behalf of the heir; the words of the will in that case were, All my personal estate of what nature or kind soever, I give to my sister *A.* and make my sister *A.* executrix, and I give to my two brothers all my real estate chargeable with payment of my debts; there it was determined the personal estate was first to be applied.

N. Stapleton v. Coleville, at the *Rolls*, July, 17, 1735. *A.* by will devises lands for life (chargeable with payment of his debts and the annuities given by the will) to his wife, and thereby gave her power and authority by sale or mortgage of such part as she should think proper to raise such sum as should be necessary for the payment of his debts, and gave her all his personal estate, and made her sole executrix, and takes notice in his will that the estate had been for several generations in his family; the Master of the *Rolls* held the personal estate discharged, and decreed *pro def'* (the wife).

On an appeal 10 July 1736. *Ld. Talbot* confirmed the decree, and said, though a personal estate is the natural fund, yet a man may substitute another fund, and the personal estate may be exempted by words that implicitly declare such intention from the whole form and tenor of the will.

Michaelmas Term

17 Geo. 2. 1743.

Everall *versus* Smalley. B. R.

Custom to
bar intails of
copyholds by
recovery or
surrender,
good.
2 Stra. 1197.
S. C.

EJECTMENT, of copyhold lands in *com' Nottingb'*. A case was made for the opinion of the court, wherein it was stated, that within the manor of *Collingham* where the land was, there were two customs of barring estates tail, which had been used within the same manor time out of mind; one way was by common recovery, the other by surrender in fee to the purchaser or vendee.

Edward Smalley on the marriage of his son *Robert*, surrendered the premises to his said son *R.* and *Susannah* his wife, and their heirs in general tail; they had issue *Edward Smalley* their son and heir, who after their deaths became tenant in tail, and 27th of *March* 1729. surrendered the premises according to the custom of the manor to *John Mills* and his heirs in fee, who dying, left *Robert Mills* his heir and plaintiff's lessor; the defendant was *Henry Smalley*, son and heir of *Edward Smalley*, who surrendered the premises to *John Mills* as aforesaid in fee.

And whether the defendant *Henry Smalley* the heir in tail was barred by the surrender in fee, where there is also a custom within the same manor of barring by recovery, was the question?

After two arguments by *Caldecott* and *Hern* for the plaintiff, and *Poole* and *Lutford* for the defendant, adjudged *per tot' cur'*, that the heir in tail was barred.

Lee Ch. Justice: It has been said at the bar that a custom in a manor to bar a tail by surrender, ought only to be allowed *ex necessitate, i. e.* when in the same manor there is no usage to bar by a recovery; there is indeed great diversity in the books as to barring

1 Sid. 314.
5 Rep. Al-
dred's case.
1 Salk. 203.
Popham 129.
Co. Lit. 59.
2 Vern. 704, 5.
Brownl. 121.
717, 484.
Ab. 634.

3 Rep. Heydon's case.
Lit. sec. 74.
2 Saund. 482.
Prec. in Canc. 429.

3 Lev. 327.
4 Rep. 23.
3 Rep. 8. b.
Eaton Gilbert's book, White and Thornburgh.

Cro. El. 380, 391, 483, 907.
Cro. El. 348, 148.
1 Leo. 174, 95.
1 Rol. Abr. 506.
Cro. El. 372.
Mo. 358, 753.
Poph. 95.
Cro. Car.
Mo. 637.
Rol.

copyhold intails, but in none of them can I find any case to warrant this distinction, the later opinion of judges is, that in manor courts where a real action can be brought, a recovery in such court will be a good bar; I own I can see no reason why this custom to bar by surrender should not be good, but it is objected that there is no recovery in value; the same may be objected to barring intailed copyholds by recovery, for recompence in value does not extend to copyholds, the issue in tail of copyholds not being barred in respect of the recovery in value; but to prevent the inconvenience of perpetuities, these two customs may well stand together, and are but two different ways of barring the intail, and I think the surrender the best.

Chapple to the same effect, and the customs must be taken to be both coeval, we cannot say which is prior, they seem equally convenient to prevent perpetuities.

Wright J. It seems to be agreed by the council on both sides, that an intail of a copyhold may be barred by a recovery, or by a surrender in fee within a manor where there is no custom for barring by recovery: but it is insisted on one side, these two customs cannot stand together; it has been a controverted question since I attended this bar, whether copyholds could be intailed; it is now at this day said they may, by custom co-operating with the *stat. de donis*: but this is quite new to me. *Stat. de donis* created no new estate. Copyholders are no more than tenants at will, and it is by the will of the lord, and his mere consent only, that they are permitted to limit their copyholds in this or that way, either by surrender, or as the custom happens to be; and surely the lord who of his mere will permits a limitation to *J. S.* and the heirs of his body, may permit *J. S.* to alien the same by surrender; no body ever thought that copyholds were within the *stat. de donis*; barring intails in copyholds have been much talked of, but I think there is no such thing, it is only a way invented and permitted by the lord to get rid of the intail; the true reason of the issue in tail being barred is the recovery over in value, now there can be no such thing in case of a copyhold; I think the surrender is a better way, if the lord permits it, because cheaper. *N. B. Wright* Justice declared that there was no possibility of understanding this matter by the books, and said he had laboured much to understand them, and could not.

Dennison J. Nothing more clear than that tenant in tail of a copyhold may bar his issue by surrender, and where there may be a real action there may be a recovery. *Co. Lit. 60. b.* These are only two different conveyances, and it might as well be said that at common law, where there is a fine that will bar the issue as well as a recovery,

recovery, that therefore one of them must be void; a surrender, I think, is a more natural way of conveying copyholds than a recovery, and I cannot see any use a recovery is of, but only to create greater expence.

Cayhill *versus* Fitzgerald B. R.

Vide Comyns
183. Shelf
and Bailly.
Post.
Judgment of
the court.
Condition of
arbitration
bond, that if
G. F. shall
perform such
award as shall
be made be-
tween plaintiff
and J. F. and
awarded that
G. F. the de-
fendant should
pay plaintiff
298 l. 9 s. 9 d.
and releases.

IN debt upon an arbitration bond, defendant craved *oyer* of the bond and condition, which recites, that whereas there were differences between one *John Fitzgerald* and plaintiff concerning a certain debt due from him to plaintiff upon a bond for 800 l. Now the condition, &c. that if the said *George Fitzgerald* (the defendant) for and on the behalf of said *J. F.* should perform such award as arbitrators should make on or before such a day between plaintiff and *J. F.* the bond to be void; and pleaded that the arbitrators did not make any award; plaintiff replied, that *Fell* and *Foster* the arbitrators made an award, and set it forth that *Geo. F.* should pay 298 l. 9 s. 9 d. and that plaintiff should receive the same in full of all demands, and that they should execute releases, and assigns breach that defendant did not pay the money; defendant demurred, and plaintiff joined in demurrer.

Mr. *Clive* for the defendant objected to the award, that it was bad, because not made between the parties to the submission; for the award is, that *G. F.* the defendant shall pay to *Mic. Cabill*, and it ought to have been between the parties, *viz. Cabill* and *J. F.* between whom the submission was; if the arbitrators go out of the submission, the award is bad. *Moore* and *Beedle*, cited in 10 *Rep.* 131. *Roll. Ab.* 246. p. 3, 4. 2dly, This award is bad because not mutual between the parties; for it is a rule in law that an award cannot be on one side only, and there were no differences between plaintiff and *G. F.* In the case of *Nott* and *Long*, *Mich.* 9 *Geo.* 2. B. R. Lord *Hardwicke* laid down, 1. That an award must be certain, and make a final end between the parties; 2dly, That the arbitrators cannot delegate their authority, but must act in person; 3dly, That they can in no case enlarge their power; and *Bacon v. Carthew* 412. was cited as in point.

Q Frontin
and Small,
Trin. 12 G. 1.

Floyd è contra, that the award is good, for that *G. F.* did submit; and the words of the bond are, *G. F.* for and on the part and behalf of *J. F.* and he binds himself, his heirs, executors, &c. for and on his and their part and behalf, therefore it is as well on the part of *G. F.* as of *J. F.* 2dly, The award is mutual, for the money was to be paid by *G. F.* in full of all demands, and that releases should be executed; and to shew that *G. F.* is liable as well as *J. F.* cited 1 *Roll. Ab.* 244. p. 18. (but *Clive* in his reply said that in that case

case C. submitted) *Yelv.* 137, 147. *Talbot* and *Godbolt*; and a release to G. F. will discharge J. F. for releases are to be construed *secundum subjectam materiam*.

Lee C. J. There seems to be no difference between this case and that in *Carth.* 412. but as the money was to be taken in full of all demands, the court doubted, at first they seemed to think the award bad; *sed adjournatur*.

Weld Executor of Weld, Esq; *versus* Nedham. B. R.

PLAINTIFF declared in debt upon a bond in the *detinet* only, which was right; defendant pleaded a sham plea that he did not detain the debt, and concluded with an averment; plaintiff demurred, then the defendant struck out the plea and demurrer, and gave the general issue *non est factum*; and now Mr. *Morton* moved for leave for plaintiff to sign his judgment, the first being a sham plea, and this irregular. Mr. *Poole* shewed for cause that it was the antient practice of the court, when there was special pleading, that defendant might strike out the same, and give the general issue; and this was also said by Mr. *Benton* (clerk of the papers) then in court, to be the antient practice; but *per tot' cur'* this is irregular, and the plaintiff shall have his judgment, for the first was a sham plea, and no special pleading; and although defendant may strike out special pleadings and give the general issue, yet that cannot be done without leave.

Practice.
A sham plea not considered as a special plea.
N. Defendant cannot waive general demurrer, but he may a special demurrer.
Mr. Monday's book 101.

Rex *versus* Shuckburgh. B. R.

DEFENDANT being taken up by virtue of a warrant from the secretary of state for publishing *Old England's Tedeum*, a blasphemous libel, was now brought up by *ba. cor.* in order to be bailed, offered bail to enter into the common recognizance for his appearance from time to time to answer such matters as should be objected against him on behalf of the crown. Mr. Attorney General insisted on bail for the defendant's good behaviour also; the Ld. Chief Justice said it had often been taken both ways, and he intended to take the opinion of all the judges; so at present, defendant himself only entered into a recognizance for his appearance, and into a rule to put in bail for his good behaviour, if the judges, or the major part of them, should be of opinion that he ought.

Bail for publishing libel.
N. The King v. Franklin; a like case in Trin. 5 G. 2. argued before all the judges as to this matter of bail, but they never gave any opinion.

Tyson *versus* Ironmonger, Esq; B. R.

An attorney's clerk in open court for male practice cannot be examined *ore tenus* upon oath. **S**TANTON, an attorney's clerk, attending the court in person upon a complaint against him for male practice, having in his affidavit fully answered the matters charged upon him; the plaintiff's counsel thought he had not told the whole truth, and proposed to interrogate him *ore tenus* in court upon oath. But *per curiam*, you cannot examine a person accused, upon oath, but ask him what you please without oath; so Sir John Strange examined him without oath, and he exculpated himself.

Sabin *versus* Long. B. R.

TRESPASS against three defendants, two of them pleaded, the other let judgment go by default; the jury on trial of the issue found for plaintiff damages 35 s. afterwards plaintiff executed a writ of inquiry against the other defendant, and the jury assessed 2 s. damages, and judgment was entred that plaintiff do recover against two defendants 35 s. and against the other 2 s. Now serjeant *Boote* moved that the 2 s. damages might be struck out, and that judgment might be entred against all three jointly for the 35 s. Rule to shew cause. N. B. This being moved, after the term wherein the judgment was given, the court refused it; and upon cause shewn by Mr. *Robinson*, the court said plaintiff might take judgment *de melioribus damnis* where several damages are given, or enter a *remittitur*; but taking damages for the whole makes the judgment bad in point of law, and we are of opinion it cannot be mended, for it is not a misprision of the clerk, but founded upon the verdict. *Vide stat. Car. 2. and Comyns 284, 5.*

Anonymous. B. R.

Notice of motion must be to quash a writ. **U**PON a motion to quash a *mandamus*, it was said by the court, you can never move to supersede or quash any writ whatever, without giving notice of motion.

Gwynne *versus* Hooke. B. R.

Whoever will take as heir male by purchase must be both heir and male. **H**ENRY *Darves* being seised in fee of lands in Com' *Pembroke* died intestate, leaving three sons, *Griffith*, *Francis* and *Thomas*; *Thomas* died without issue in the life of his brother *Griffith*; *Griffith* the eldest son entred and was seised in fee, and married *Alice Pritchard*

Pritchard his first wife, by whom he had issue one daughter only *Phæbe*, who married *Griffith White*, by whom she had issue one daughter only *Elizabeth*, who had four husbands; 1st, *Thomas Lord Lort*, 2d, Lord Viscount *Bulkley*, 3d, *Thomas Ferrers*, and the 4th *John Hooke* the defendant, who claims under a marriage settlement made by his wife *Elizabeth*, the granddaughter and heir general of *Griffith Dawes*. *Griffith* married *Jane Bowen* his second wife, by whom he left no issue.

Francis Dawes the second son of *Henry Dawes* (the common ancestor) had issue two daughters *Judith* and *Margaret*; *Judith* married *Rowland Gwynne*, by whom he had two daughters *Dorothy* and *Priscilla*, two of the plaintiffs, and *Margaret* married *William Williams*, by whom she had *Elizabeth* the other plaintiff.

In November 1693. *Griffith Dawes* being seised in fee as aforesaid made his will, and (int' al') gave the premises in question to his wife *Jane* during her life, and after her decease to my granddaughter the Lady *Bulkely* during her natural life, and after her decease to the right heirs male of me the said *Griffith Dawes* for ever; and having so made his will died in January 1693. *Jane* his wife entred and enjoyed the lands till March 1693. when she died, then lady *Bulkley* entred and enjoyed the same, and on her marriage with *Hooke* the defendant in 1729. made a settlement under which he claims; *Francis Dawes*, the second son of the common ancestor, and only surviving brother of the testator, died in the life of lady *Bulkley*, who also died without issue 8th of May 1736. and thereupon defendant *Hooke* then entred under the settlement, and is now possessed.

The single question in this case is, what is the true meaning and construction to be put upon these words of the will, *to the right heirs male of me the said Griffith Dawes for ever*.

This was a case sent by my Lord *Hardwicke Canc'* to the judges of B. R. for their opinion, and was solemnly argued twice, the first time Pas. 16 Geo. 2. the second time in Mich. 17 Geo. 2. by *Probyn* and *Hume* for the plaintiffs, and *Wilbrabam* and *Ford* for the defendants.

Probyn argued, that *Francis Dawes*, brother of the testator, being living at the time of the devise, might well take by the said words, which are descriptive of the person, and they are words of purchase in fee; that lady *Bulkley* could not take by them; she could not take as heir male by purchase must not only be male but heir too. 1 Vent. 372. Pybus and Mitford. Eq. Caf. Ab. Baker and Wall. Pollex 457. James and Richards, Eq. Caf. Abr.

Co. Lit. 9. b.
10. b.
Prec. in Canc.
447. Brown
and Barkham;
he that will

take

take a tail, because she ought in that case to be both heir and male, which she is not; she cannot take a fee by will because she is heir general, if she takes at all it must be by course of descent: in *Trin.* 8 *Annæ C. B.* 2 *Vern.* 736. Where a devise to his heir male, although neither heir of the body, nor heir at law, held good, (*sed N. B.* because by other words in the will it appeared testator did not intend he should be hindered from taking by his heir female) *Peere Wms.* 229. That heir male was a good description at common law, *Co. Lit.* 27. a. The word *male* is not to be rejected, it denotes the brother where there is a daughter. 3 *Rep.* 40. 1 *Lev.* 172. 1 *Vent.* 88.

Gurdon and Sheldon in Vaugh. 9 H. 6. 23. S. C. Bro. tit. Devise, p. 5. Shelly's case. 37 H. 8. Bro. 61. tit. Tail 33. Moore 136. Dy. 373. *Wilbraham pro def*: That the words are void for uncertainty, and nothing can pass by this devise, no one can be heir male, but he who is also truly heir at law; and in the case of *Counden and Clarke Hob.* 31. it is expressly laid down, that when the limitation is made, to heirs males or females, he or she that will take must have both words verified in him, or her, that is, that such person must not only be heir, but also male or female, as the limitation happens to be. *Co. Lit.* 164. a. 24. b. *Prec. in Canc.* 54. *Sterling and Etrick.* 3 *Salk.* *Ford and Lord Offulton, Pas.* 1708. *Rot'lo* 310. 2 *Peere Wms.* *Dawes and Ferrers.* *Prec. in Canc.* 591. S. C. 442. and *Vern.*

Pollex. 457. *Mich.* 17 *Geo.* 2. *Hume pro quer*: That the intention of the testator is the best rule for construction of wills, 3 *Rep.* 20. *Boraston's* case; he made two questions; 1st, Whether *Francis* took any estate, and if he took any; 2^{dly}, What that estate was. *Burchet and Durdant.* *Prec. in Canc.* 465.

Beaumont and Long in Dom' procerum, *Mich.* 1713. *Abr. Cas. in Eq.* 214. *V. opinion* 10 Judges. And as to the 1st, The words right heirs male are a plain description of a person then in being, whom testator must mean by that description, and could be none but his brother *Francis*, who was then in being; 2^{dly}, He is intitled to a fee, for in a will the words *for ever* no doubt carry a fee-simple.

Ford pro def: I agree with Mr. *Hume* as to the general rule for the construction of wills as to the testator's intention; but must beg leave to add that such construction must be consistent with the rules of law. He that will take as heir male by purchase, must be both heir and male; this is a general rule, and I think there be but two cases where it can be departed from; the 1st, Where by the limitation to heir male there is somebody particularly pointed out; 2^{dly}, Or words to exclude the right heir; that a limitation to heirs male does not extend to collaterals, is laid down in *Coundall and Clarke.* If these words *to the right heirs male of me, &c.* were in a deed they would

would create a tail, as in *Beresford's* case. † I think if Lady Bulkley had had a son at the last moment of her life, such child might have taken by way of contingent remainder; and if Francis the brother took any estate at all, it must be a tail; in a deed, a limitation to one and his heirs males for ever would be a fee simple, because uncertain of whose body such heirs shall be meant, but in a will it is a tail, because the intention of the deviser, and the court will supply the word body; and so held in *Ford* and *Ld. Offulton*. Francis is dead without issue, so the estate descended to Lady Bulkley under whom defendant claims.

† The words of me the said G. D. denote of what body.

Hume: It is said that a son of Lady Bulkley might have taken as heir male by the words: but I deny that, for Lord Coke says, he who will take as heir male must convey his descent through all males, so that a son of a daughter cannot take.

Adjournatur.

Frampton versus Coulson. B. R.

IN case upon a promissory note payable four months after date; judgment in C. B. by *nil dicit*; error brought, and upon common errors assigned, objected by Mr. Cay for plaintiff in error, that it is laid in the declaration, that the request to pay the money on the note was upon the same day and year the note is dated, which is four months before it became due; but answered by Mr. Poole *pro def* in error, that there is no occasion to lay any request at all; and so it was adjudged *per tot' cur'*, for the bringing the action is a request in law, and it appears that the action was not brought till above a year after the note was due, but if it had been necessary to have laid a request, it appears in the conclusion of the declaration, that the plaintiff in error was often *afterwards* requested, which would be sufficient.

A request laid in the declaration to pay the debt before it is due is not material.

Vide *Saund.* 33. when it is material to aver a request.

Newcomb versus Green. B. R.

ACTION of covenant upon a deed; breach assigned for non-payment of 274 l. 4 s. 11 d. defendant pleaded *non est factum*; Postea amended by the judge's notes. a verdict was given for the plaintiff, and the said sum in damages, but by mistake the associate had only marked on the *postea* 1 s. damages; and now Mr. Hussey moved to amend the *postea* by the minutes of Judge Burnet, who tried the cause (upon the authority of *Cro. Car.* 338. *Elliot v. Skypp*, and *Bold's* case in *Salk.*) the judge having taken it down right. It was objected by Mr. Clive, who shewed cause that this was making a new verdict for the jury; he

2 Stra. 1197. S. C.

Salk. 53.

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also

also cited a case, *Paf.* 11 or 12 *Geo.* 2. *Ray* and *Lifter*, in debt on three several judgments, and damages laid in the declaration to 10*l.* the jury gave 30*l.* and judgment being entred for that sum, error was brought, and it was moved to amend the damages to 10*l.* but the court refused it; it was afterwards moved to remit 20*l.* but that also refused; but *per tot' cur'*, as to the case at bar, this is not altering the verdict, but rectifying a mistake of the clerk, and we will give more credit to the Judge who tried the cause, then to the clerk, and ordered the *postea* to be amended.

N. Chapple J. cited *Fry v. ——— coram Ld. Raymond*; action for words, evidence given upon one set that were actionable, and by mistake a verdict being taken on a set not actionable, and great damages, the *Postea* was altered by the Judge's notes.

Finney versus Finney. In Chancery, 15 Nov. 1743.

Parolevidence
to prove a
bond was
given in lieu
of dower re-
fused.

*Q. Vizard and
Long, Mic.
5 Geo. 2.
Lawrence and
Lawrence
coram Lord
Sommers,
1718.*

THE plaintiff's bill was brought for dower, and to have a satisfied term which was set up against her at law removed out of her way; defendant by his answer set up a bond by the husband before marriage, conditioned to pay 400*l.* to the plaintiff's use in case she survived him, and suggested by his answer that *that* bond was agreed to be in lieu of dower; and he brought his cross bill upon that suggestion praying an injunction against her proceeding at law, in dower. *N. B.* The condition of the bond did not express it to be in lieu or satisfaction of dower, neither was there any written evidence to that purpose; the defendant in the original bill offered to read parole proof of the plaintiff's having often acknowledged that the bond was given in lieu of dower, but *per Ld. Hardwicke*, such proof cannot be read; so decreed plaintiff her dower.

Lucam versus Mertins. In Chancery.

Mortgagee
for lives can-
not compel
mortgagor to
fill them up as
they drop, but
may do it
himself, and
add the ex-
pence to the
mortgage
money.

DECLARED *per Ld. Hardwicke canc'*, that a mortgagee of an estate for one, two or three lives, cannot compel the mortgagor to fill them up as they fall in, but he may do it himself, and add it to the mortgage money, and be allowed it when his mortgage is paid off.

Rex

Rex *versus* Howlett. B. R.

MR. Poole moved to discharge two rules for *certiorari's* to remove two orders of bastardy, application not having been made to the court for the said rules within six calendar months, as directed by *stat. 13 Geo. 2.* The motion was granted *per tot' cur'.*

Rule for *certiorari* to remove order of bastardy discharged because not applied for in six months.

N. one of the orders of bastardy was made before the said statute, so it was objected by Mr. Floyd that it was not within it; but *per cur'*, the words *had or made* in the statute have a retrospect.

Anonymous.

LUKE Robinson moved that the defendant in error might have leave to transcribe the record, (the plaintiff in error not having done it) in order to *non prof'* the writ of error, and to have the benefit of the recognizance entred into by the bail upon the writ of error; but *per cur'* Chapple, Wright and Dennison, *absente* Lee C. J. it never was done.

The defendant in error cannot transcribe the record.

Wynne *versus* Wynne. B. R.

ERROR brought to reverse a common recovery with double voucher of lands in *com' Salop'*, wherein Sir Watkin Williams Wynne, Bart. was demandant, William Thomas tenant, James Apperley and Alatheia his wife, first (and jointly vouched) vouchees, who vouched the common vouchee. By the record it appears that the writ of entry *sur disseisin in le post*, was returnable *quinden' Pas.* 13 Geo. 2. to which the tenant appeared in person, and vouched the said James Apperley and Alatheia his wife, whereupon a writ of summons *ad warrantizandum* is awarded, returnable in *Crastino ascensionis Domini*, (which was on the 16th of May) *ad quem diem ven' tam præd' le demandant in propria persona sua quam præd' le ten' per attorn' suum et præd' J. A. & A. ux' ejus per Josiam Hodson attorn' suum similiter ven'*, and enter into warranty, and vouch over the common vouchee, who appears and pleads *quod præd' Hugo non disseisivit præfat' Watkin de le lands prout per bre' & narr' præd' superius supponitur & de hoc ponit se super patriam*; he then imparls and makes default, and thereupon judgment is given and a common recovery had, and a writ of seisin awarded, and the sheriff returns he has delivered seisin.

Post. The vouchee in a recovery dies before the return of the writ of summons *ad warrantizandum.*

The

The error assigned is, that *Alathea* died before the giving judgment in the said recovery, and for this the plaintiff in error prays the recovery may be reversed; issue joined that *Alathea* did not die before the giving the said judgment, which was tried at the summer assizes at *Salop* 1741. and a special verdict taken, which finds the recovery as before stated with the mittimus and transcript of the *dedimus potestatem* to take the warrant of attorney of the vouches, and that *Alathea* died the 10th of *May* 1740. (which is six days before the return of the writ of summons) but whether she died before judgment or not, the jurors do not know, and so conclude in the usual form, leaving *that* to the judgment of the court.

Skinner the King's ancient serjeant for the plaintiff in error.

It appears by the record that the summons was returnable the 16th of *May*, and therefore judgment (as I contend) could not be given before that day; so the

1st Question will be, whether the death of *Alathea* found to be the 10th of *May*, will not vitiate and make the judgment erroneous?

2dly, What effect this finding of the jury shall have, and whether the court may not say that she did not die before judgment, and whether it can be made good by relation to the 1st day of the term.

I admit, my Lord *Coke* says, that records import absolute truth, the reason is, that there may be an end of controversies; I admit also that common recoveries are generally to be favoured, but at the same time, must insist, that the forms of proceedings thereupon ought to be strictly kept up and adhered to; and although the term is to be considered but as one day for the furtherance of justice, yet that rule is to be considered with many restrictions.

1. Whether the death of *Alathea* found to be on the 10th of *May*, does not make the judgment erroneous? suppose she had not prayed a *dedimus potestatem*, and had died before day given, there could not have been any further proceedings; but that it is erroneous, the case of Sir *Thomas Gower*, 2 *Vent.* 90. is exactly in point; and it is every day's experience upon motions to enter judgment on old warrants of attorney, the court requires an affidavit that the defendant is living; the conusor in a fine is not in court until the return of the writ of covenant. *Roe and Evelyn*, 2 *Sid.* 54, 92. and to proceed upon a fine, the conusor being dead before the return, is like building without a foundation; if vouchee dies before execution,

2 Lev. 127.
Comber. 57,
71.
3 Salk. 168.
Piggot 169.
Co. Lit. 52.

tion, I own, according to *Shelly's* case, *fo. 108. a.* writ of seisin may issue. It was objected in the former argument, that the error assigned was averring against the record, but I insist, that this is a matter collateral, and being so, may be assigned for error.

21. Mic. 1734. *Da Costa v. —* Stat. 17 C. 2. cap. 8. made perpetual by 1 Jac. 2. c. 17. 20 H. 7. 19, 20. *Dyer* 89. *Cro. El.* 468. *Cro. Jac.* 11. *Yelv.* 33. 4 Rep. 71. *Hind's* case.

2dly, Whether this judgment, by relation, shall be said to be given the first day of *Easter* term?

It is said the whole term is only one legal day; but that is a fiction, and *in fictione juris semper est æquitas, ut res magis valeat quam pereat*, 4 Rep. *Styles* 14. The very continuances in the recovery take away all presumption that the judgment was the first day of the term, for to say so would be to contradict the record; and *Lit.* says, the law is proved by the pleadings. 1 *Inst.* 115. Therefore as *Alathea* died the 10th of *May*, before the return of the writ of summons, and consequently before judgment, and as that judgment (I humbly contend) cannot be made good by relation, I pray the recovery may be reversed.

Draper serjeant *pro def'* in error: I admit that the death of the vouchee is a countermand of the warrant of attorney, but must add this question, can it be assigned for error on record?

There have been many cases cited to shew that the death of the vouchee before judgment may be assigned for error, but none of them come up to the case at bar; I will shew how they differ from it. In *Bro. Error*, 92, 165. it is laid down if death be assigned for error, the defendant must not plead *in nullo est erratum, mes doit respondere severalmment car ceo est triable per pais*. Cases of death between *nisi prius* and day in bank; 2 *Bulst.* 241. a case relied on by the other side; S. C. in 1 *Roll. Rep.* 51. 1 *Roll. Abr.* cannot govern this case because given by statute, and therefore cannot operate at common law. And 1 *Roll. Ab.* 768. 1 *Roll. Rep.* 14. *Cro. Jac.* 356. *Cro. El.* 202. all these were upon motions to stay proceedings, and in one of them it appears the court could not stay the proceedings; the other cases are where it has been to stay the judgment, as 1 *Leo.* 187. 1 *Sid.* 131. moved but not determined. *Sid.* 93. 1 *Mod.* 5. Cases on warrants of attorney to enter judgment, 1 *Vent.* 310. 1 *Salk.* 87. Such judgments are good when entred after the partie's dead; *Ray.* 18. *Andrew* and *Sewell.* *Farref.* 2. *Fuller* and *Jocelyn*; if death of the party could be assigned for error, what occasion to apply to the court; it is very remarkable that in all the books there cannot be found one instance wherever the death of the plaintiff or defendant hath been assigned for error, and the judgment there-

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upon

Lit. Rep. 315. upon reversed for that error; where it appears by the record (as in
 1 Rol. Ab. this case) that any of the parties appeared on such a day, the death
 768. p. 2. of such party before that day cannot be assigned for error, because
 Poph. 132. contrary to the record; in the case of *Plummer and Webb & al'*, in
 Daly. 17. S.C. debt. on a bond *non est factum* was pleaded; *Webb*, one of the de-
 11 H. 6. 42. fendants, died before *nisi prius*; error was brought, and it was
 Dy. 101. held by this court, that the death of the said defendant before *nisi*
 1 Rol. Ab. 756. *prius* was not assignable for error; *Ld. Raym.* 1414. another case
 Cro. Jac. 11. like this, it appears by the record that *Alathea* was living, or she
 Cro. El. 665, 468. could not have appeared by her attorney; and there can be no in-
 Cro. Jac. 521. conveniency in making this record good, for the recovery was ac-
 Cro. Car. 53. tually passed at bar before the death of *Alathea*.
 Sir T. Jones 187.
 50 Ed. 3. 7.
 Jenk. 179. 28 Affis. 17. Rol. Ab. 783. p. 15, 16, 17. 19 Affis. p. 8. Bro. Error 117. Vide Danvers.
 Cro. El. 739. 1 Rol. Rep. 301. Dy. 201. Skin. 39. Raym. 463. 2 Show. 173. 3 Mod. 249.

If the assignment of error in this case be contrary to the record, the finding of the jury is also contrary to it, and therefore void, according to 11 H. 6. 42. for the record says that all the parties appeared in *Cro. Ascension' Domini*.

1 Bull. 161. The nature of this judgment of departure in contempt of the
 3 Salk. 213, court; it supposes that the common vouchee asked leave to go out
 280. of court; upon this imparlance he leaves the rest of the parties in
 1 Rol. Ab. court; the demandant might go out for a minute and return again
 583. l. 4. into court, and when he came he might ask, where is the vouchee
 Cases touch- that I may demand against him; who being gone out upon a gene-
 ing Fines, ral imparlance *et nemy al jour prefix, car la sur son default judgment*
 2 Sid. 94, 92. *final ferra done quia recessit in contemptum cur'*, *car sur general im-*
 2 Lev. 127. *parlance le common vouchee ad impris sur luy destre tous foits prist*
 Comber. 57, *a defender son droit, set autrement est sur imparlance pris al jour cer-*
 71. *tain, lou petit cape tantum duit aver estre agardr. Yelv. 211.*
 3 Salk. 168.
 Cro. El. 468.
 3 Mod. 180.
 Farref. 2.

Whether this judgment appears by the verdict to be erroneous? the summons is awarded to be returnable in *Cro. Asc.* then the record goes on and says, at which day came the demandant and tenant, and the vouchees being summoned likewise came and vouched over; now if the word *before* had been put instead of *at*, this had been a good recovery without doubt, for the vouchee might not be summoned and yet might appear well enough by law, the vouchee might be standing near the court and hear what was transacting there between the demandant and tenant, and might hear himself vouched and a summons awarded, and thereupon might speak to an attorney then in court, *Sir, do you take care of this cause for me, and appear for me now.*

Whether therefore *Alathea* might not appear before the summons, and if so, whether she did or not? the time of appearance is
 2 not

not triable by the country *set per record coram les justices*, 2 Roll. Abr. 574. p. 1. And nothing is more common than to file warrants of attorney 12 months after the judgment, and the time when filed is not assignable for error; and in Hil. term 4 Geo. 2. Manning and Brook in B. R. so held, it was an action on the case, interlocutory judgment was of Easter term, final judgment of Trinity term, warrants for both parties were returned as filed of Trinity term; objected, that the defendant was out of court upon the interlocutory judgment, and therefore the warrants ought to have been of Easter term; but held, that by the common law warrants of attorney may be filed after judgment, and so the judgment was affirmed. The power to make attornies out of court is given by statute, and the common law was, that attornies should be appointed in court actually present; the *stat. of Carlisle*, 15 Ed. 2. first gave the *ded. pot.* to take warrants of attorney out of court; but that statute is only directory, and at the discretion of the court. Ray. 70, 1. and according to 1 Lev. 130. the vouchee might come in before the summons and make an attorney; and in Sid. 213. it is said the vouchee may come in by himself or attorney, though there be no process, and the appearance is not to the writ of summons but to the suit, the *ded. pot.* and warrant of attorney give no power to appear on the morrow of the ascension, but only *ad lucrandum vel perdendum in placito terræ*: in a common suit, defendant may appear before the return of the *capias*, and then the *capias* is out of the case, for the appearance is to the suit, and not to the *capias*; and notwithstanding this the judgment is of the first day of the term: if therefore the vouchees might legally appear before the summons, and they could not appear at the day, (in Cro. Asc.) what must be the import of this warrant of attorney; surely it must be, that they did appear before, and the plaintiff in error cannot aver against it.

The Judgment in this recovery shall have relation to the first day of the term: the general intendment of the law is, that every judgment has relation to the first day of the term; the reason is, because the court cannot determine every suitor's case in one day, and term and vacation are as one day, and judgment shall have relation to the first day, unless there be a memorandum entred on the roll to the contrary; if a writ be brought against two executors, and abate by the death of one, and plaintiff sues out a new original by *journeys accounts*, all the proceedings relate to the teste of the first original so as to bind the assets. In *Smith and Raydon*, Mich. 12 Geo. 1. B. R. the court ordered a special memorandum to be made, in order to give the party leave to plead a tender.

As to continuances, there are several distinctions:

1. Between the commencement of the suit, and the continuance of it.

2. Be-

2. Between the continuance of process, and of the plea.

3. Between the continuance of plea from term to term, and from one return to another. This court has no jurisdiction till filing the bill, the process is only collateral; I know of no instance of the continuance of a plea from one return to another in the same term. In the case of *Martin and Wyvbourn*, Hil. 8 Geo. 1. action on S. S. contract and demurrer joined in Mich. 8 Geo. upon the 1st day of Hilary term, defendant pleaded *puis darrein continuance*, that the contract was not registred, which by the act of parliament was to be registred on or before the 1st of November; the plea was, that after the last day of Mich. term, and before the 1st of Hill. following, plaintiff entred continuances in Mich. term from day to day, so that this plea was not after the last continuance; the court being moved to strike out these continuances, declared them to be contrary to law, and parties are not to be harrassed from day to day, but continuances must be from term to term. In *Pasf. 15 Geo. 2. B. R. elegit*, or *sci. fa.* against tertenants, judgment recovered on such a day, which was in the middle of Easter term; tertenants craved oyer, and on demurrer it was held good, and judgment for plaintiff, though it was objected it was not the same judgment, because in the middle of the term. If no continuance at all be entred from one term to another, yet if the parties appear the plea is continued, as in *Dobson and Dobson B. R.* upon error in dower upon a judgment by default there was entred on the record summon, &c. it did not appear whether there was any continuance, so objected, that for that cause it was error; but answered *per cur'*, that there needs no such entry, for the appearance of the parties at the day, was a continuance in law. If the continuance of the day be immaterial, as appears by *Kelw.* it is; what then says the *stat. 23 Eliz.* No recovery shall be, &c. what is this but a mistake of the clerk in writing *at* instead of *before*.

It is objected that rules of court divide the term, rules are not records, only remembrances, not entred on the rolls of the court.

Skinner's reply: It is agreed common recoveries are favoured, that the death of a party is a countermand of the power of attorney; but it is objected such countermand cannot be assigned for error. My brother calls for a case; *Trevilcock and Harvey*, Trin. 5 Geo. 2. B. R. rot. 556. is in point against him; here is the record in my hand, my brother *Belfield* acquainted me he was for the defendant in error, so it did not pass *sub silentio* for old Mr. *Agar* was on the other side; *Alathea* could not appear before the summons. 1 Leon. 86. and the jury have found she died 10th of May, so she could not appear; my brother objected that case is not law, it was the clear opinion of all the Judges, and also of the pronothonary; but

Spelman 96.
2 Lutw. 1142,
742, 1177.
Hil. 3 Geo.
Stonehouse
and Mullins.
Price and
Kendrick,
Bernardist.
Rep.

11 Rep. 5, 6.
Heydon's
case.

Kelw. 56. b.
3 Lev. 191.
2 Vern. 551.
1 Peere Wms.
91, 41, 90.
9 Rep.
Raym. 161.

Piggot 169.
1 Leon. 86.
Pasf. 32 Eliz.
Pasf. 12 Jac.
Lee v. —
Latch 92.

but says my brother, the appearance is not to the summons but to the suit; if she had appeared in person herself, I own that would have determined the authority of the attorney, but she did not: the very entry of continuances destroys the relation to the 1st day of term; and if the party could not appear till the return of the summons, then the word *at* is right. *Wynne and Wynne. Adjournatur. Post. 42.*

Anonymous.

MR. *Benne* moved to discharge a rule for changing the *venue* Venue cannot be changed in action on a note of hand. from *London* to *Kent*, the action being upon a promissory note; but refused *per cur'*, although he cited several cases in the Common Pleas where it had been done, and bid him search precedents in this court.

Rex versus Watson & al'.

AN information was granted against the defendants for procuring Information against overseers for procuring a soldier to marry a poor woman chargeable to the parish. one *Vine* a soldier, who had a settlement in the parish of *Brill*, to marry a poor woman who was an idiot and chargeable to the parish of *Dorton*, by giving *Vine* ten pounds and a fat hog for marrying her, whereby she and her child became chargeable to *Brill*; *Per Lee Ch. Justice, Wright and Dennison, absente Chapple: N. Pilsworth* who moved it, said he remembered a like case which himself moved in *Hil. 1735.* and there the court granted an information. *Rex v. Watson and Perrot, overseers of the poor of the parish of Dorton in Com. Bucks.*

Graham versus Benton. B. R.

JUDGMENT was recovered against defendant a bankrupt in the Bankrupt getting his certificate after judgment shall be discharged on motion. Palace Court for a debt owing before the bankruptcy, and defendant not being able to obtain his certificate before the said judgment, had no opportunity of pleading it, therefore to gain time and suspend execution, defendant brought error in the King's Bench, and judgment was thereon affirmed, whereupon he rendred himself in *custod' mar'*, and now having obtained his certificate, moved *per Mr. Benne* that he might be discharged upon the *stat. 5 Geo. 2. sec. 13.* which was read. Cause shewn by *Floyd and Stracey*; but *per tot' cur'*, defendant is discharged by the statute two ways, either by pleading his certificate if in time, or by applying to a Judge (after his certificate obtained) after judgment; though costs have been incurred after the bankruptcy, yet those and the debt are considered only as one debt, and execution could not be prevented but by bringing error. Stat. H. 7. as to colls.

M

Hilary

Hilary Term

17 Geo. 2. 1743.

Wynne *versus* Wynne. B. R.

LEE Ch. Justice delivered the unanimous opinion of the court, and made three points in this case :

Ante.
Post.

1st, Whether the death of *Alathea*, one of the vouchees before judgment, be error ?

Vouchee dies
before the re-
turn of the
writ of sum-
mons, the
recovery is
erroneous.

2^d, Supposing it be error, yet whether by construction of law this judgment shall not have relation to the first day of the term, and whether the court will not intend the appearance of the vouchee *gratis*, and have no regard to the day given on the return of the summons ?

3^d, Whether the plaintiff in error be not estopped to assign the death of the vouchee to be on the 10th of *May* before judgment, when it appears upon the face of the record that she appeared by attorney at the return of the summons, *viz.* 16th of *May* ?

And we are all clearly of opinion with the plaintiff in error in this case, that the death of the vouchee before judgment is error ; and 2^{dly}, That the judgment cannot be made good by relation to the first day of the term ; and 3^{dly}, That the death of the vouchee is a collateral matter and not contrary to the record, and therefore the plaintiff is not estopped to assign it for error.

As to the first point, *vide* *F. N. B.* printed 1718. *fo.* 45. letter *B.* 2 *Inst.* 240. and that the vouchee is considered as tenant, *vide* *Bro. tit. error* 51, 131. *B.* 491. *Co. Lit.* 265. *Hob.* 225. It was said by defendant's counsel at the bar that this was not assignable for error, and for that purpose were cited 18 *Ed.* 3. 36, 38. 2 *Inst.* 245. But that the death of the vouchee does not abate the writ, *vide* *Jenkins* 179. *Theol. Digest. lib.* 12. *c.* 3. 2 *Rol. Abr.* 764. *p.* 2. 20 *H.* 7. *fo.* 10. That a remainder man may, as in this case,

bring error to reverse a common recovery, *Cro. El.* 739. *Holland* Piggott 169. and *Dansey, Godbolt* 379. 21 *H.* 6. 29. 2 *Jon.* 182.

2dly, We are all of opinion we must give judgment according to what appears to us upon the face of the record: now it appears there was a writ of summons, and that all that was done by *Alathea* the vouchee was done by her attorney, and where there is a summons, the constant usage and rule of law is for the vouchee to appear by attorney. 1 *Leo.* 86, 291, the appearance therefore by the vouchee, as stated on the record, is right, as it ought to be by law; it would therefore be very strange for the court to suppose any other appearance when this is strictly right according to law, which is upon day given, viz. the return of the summons, at which day we are clear of opinion this judgment was given by the *C. B.* upon this record. When a vouchee appears in person at the return of the writ of entry, then the judgment is upon the return day of the writ of entry: but the writ of summons in the case at bar is the first process as to the vouchee; as to what has been said about relation and continuances it is all out of the case.

3dly, It has been urged that the death of the vouchee is contrary to the record, and therefore the plaintiff is estopped to assign it for error; and for that purpose has been cited 10 *H.* 7. 21. *Roll.* Ab. 86. 11 *H.* 6. 42. 50 *Ed.* 3. 7. *Cro. Jac.* 11. *Yelv.* 33. The rule of estoppels is (to be sure) that a man shall never be received to alledge any thing for error that is contrary to the record, but we are all clear that, in this case, the death of the vouchee is not contrary to, but a matter collateral to the record, and properly assigned and triable *per pais*, 4 *Co.* 7. for all that the record says, is, that the vouchee came by her attorney; it does not say any thing of her actual existence at that time, but puts a matter in issue properly triable by the country: If an infant vouchee appear in person infancy must be tried by inspection only, and during his nonage he may have error to reverse the recovery. Appearance in person and by attorney are very different, vide 1 *Sid.* 322, 392. 4 *Rep.* 71. 1 *Lev.* 80. 1 *Sid.* 93. *Ray.* 59. And Ch. Justice concluded with a saying of *Popham*, fo. 23. That gross absurdities ought not to be admitted in recoveries; and was going to pronounce judgment of reversal, but, upon the motion of Sir *John Strange*, judgment was respited till application should be made to *C. B.* to try to make the recovery right, by some alteration. 2. What alteration.

Shelly's case,
Comb 67.
Carth. 367.
Hil. 7 *W.* 3.
Walker and
Stockow.
2 *Ld. Raym.*
1415. this
last case does
not contradict
what *C. J.*
says.
2 *Bulf.* 243.
Post.

Bradley

Bradley *versus* Wyndham sheriff of Hampshire. B. R.

A first fieri facias executed fraudulently, a 2d fieri facias at the suit of another executed afterwards shall stand and be preferred, and the matter was properly left to a jury.

ACTION for a false return of a *feri facias*; defendant pleaded Not guilty, and at the trial the plaintiff proved her judgment and *feri facias*, and *nulla bona* thereupon returned; it was also proved that one *Whiteball* was made special bailiff, and that the warrant upon the *fi. fa.* was directed to him, *Richard Harrison* and another; that one *Swanton* the plaintiff's attorney was present at the time of executing it, and ordered *Whiteball* to use the defendant *Crop* in that action kindly, and not to take any of his household goods, for that *Crop's* landlord, one *Earl*, would soon be in the country and pay the debt; so *Harrison* the bailiff rode round the farm and grounds and said, "*I seize all this corn and cattle*", (and took some account thereof) for the use of the plaintiff; this *feri facias* was tested the 11th of *May*, and executed the 14th of the same month 1742. in the manner mentioned.

Afterwards on the 20th of *May* 1742. *Earl*, *Crop's* landlord, to whom he was also indebted upon a judgment, sued out a *feri facias* thereupon, and the sheriff's bailiffs not being in possession of *Crop's* goods, nor having left any body for them, as was proved, *Earl* got his execution executed; and there was no proof that *Earl* promised to pay the plaintiff; it was left to the jury upon this evidence, whether the execution that first came into *Crop's* house was intended to be, or was really executed; and the jury thought it was not, and gave a verdict for the sheriff. Mr. *Henley* now moved to set aside the verdict; but *per totam curiam*, the Judge (*Burnett*) very rightly left the matter to the jury, and there is not the least foundation for a new trial, for the jury have determined the first execution fraudulent, 1 *Salk.* 320. *Carth.* 419. S. C. 5 *Mod.* 375. 1 *Ld. Raym.* 251.

Barber *versus* Dixon. B. R.

A custom for one common-erto inclose against another is good.

SPECIAL action upon the case, that whereas the plaintiff is seised of the rectory impropriate of *A.* and has a right of common in a certain field containing 110000 acres, and that the defendant inclosed part of that field, whereby the plaintiff could not enjoy his common in so ample and beneficial a manner as he before had enjoyed the same, to the plaintiff's damage.

The defendant pleaded two pleas, first the general issue Not guilty, secondly, a special justification in bar that he was possessed of certain land in the said common field, and that it had been a custom time out of mind, for all those who had any lands in the said field to inclose as much thereof *ad libitum* as they pleased, and that the defendant by virtue of his possession, and of the custom inclosed; the plaintiff replies and traverses the custom to inclose, and thereupon issue is joined.

Where several pleas go each to the whole, if any of them be found for the defendant he shall have a general verdict.

This cause was tried at *Hertford* summer assizes 1742. before Baron *Reynolds*, who reported that the defendant upon the Not guilty put the plaintiff upon proving his declaration, which he did very satisfactorily, and then the defendant proved his plea in bar as fully, and thereupon the jury found a verdict for the defendant generally.

And now it was moved for a new trial; first, because the plaintiff ought to have had a verdict upon the issue of Not guilty; and 2dly, That this is a bad custom. But it was resolved *per totam curiam*, if there are several pleas pleaded, each of which goes to the whole declaration, and any one of them be proved, which absolutely destroys the plaintiff's action, a general verdict for the defendant, as in the present case, is very right.

And 2dly, *Per totam curiam*, this is a very good custom, and is in the nature of shack, and the freeholders under such a custom as this may well inclose one against another; and this is exactly like *Sir Miles Corbet's case*. 7 Rep. 5.

It was also said by *Lee C. J.* and *Dennison J.* and not denied by the other two Judges, that in an action upon the case, as this is, this custom might have been given in evidence upon the general issue, for it proves the defendant not guilty of the *gravamen* laid in the plaintiff's declaration, and a defendant in an action on the case may give in evidence any matter that destroys the plaintiff's action; but that in an action of trespass *vi & armis* the special matter must be pleaded, and there the defendant must confess and avoid; but in an action upon the case it is otherwise. Cited *pro def.* 1 *Ld. Raym.* *Kent v. Wright*. 2 Mod. 274. *Cro. Car.* 432. *Pro quer'*, 2 Mod. 104. 9 Rep. *Aldred's case*. 1 Roll. Abr. 239. 2 Roll. Abr. 682. p. 1. New trial refused, and judgment *pro def.*

In actions upon the case any thing may be given in evidence on the general issue, which will destroy the plaintiff's action.

Gomez ferra *versus* Berkley. B. R.

A note drawn by A. payable to B. or order for value received, B. pays it away to C. afterwards B. takes it up and pays C. the value, afterwards B. pays it to C. a second time, then B. fails, and C. brings an action against A. the drawer, and the jury find for the defendant because the note was once taken up and paid; but the court granted a new trial.

THIS was an action upon a promisory note of 130*l.* for value received, payable by defendant to *Collison* and *Lambert*, or order, and by them indorsed to the plaintiff; upon *non assumpsit*, this cause came on to be tried at *Guildball*, when the case upon the evidence appeared to be thus, *viz.* That this note was drawn by *Berkley*, and paid away to the plaintiff by *Collison* and C^o. that afterwards *Collison* and C^o. took it back again, and paid the plaintiff his money for it; that after this, the plaintiff sold goods to *Collison* and C^o. who a second time gave the plaintiff the same note for payment thereof; and afterwards *Collison* and C^o. failing, the plaintiff brought this action against the drawer; and the jury gave a verdict for the defendant, because the note had been once taken up and paid: and now it was moved for a new trial, because this is a note for value received, and there was no evidence whatever that the plaintiff knew of any transaction between the defendant and *Collison* and C^o. or whether this was a lent note by the defendant to them; for it appeared to the plaintiff that the defendant was still liable to *Collison* and *Lambert*, when they paid the plaintiff this note a second time, and the plaintiff ought to stand in their place; and so it was held, and a new trial was granted *per totam curiam*.

Hull *versus* Pitfield. B. R.

If the drawer of a note be sued by the indorsee, and the bail for the drawer pays the debt and costs, this absolutely discharges the indorser, as much as if the drawer himself had paid off the note.

CASE upon a promisory note dated the 13th of *December* 1737. drawn by *Robert Scraiston*, whereby he promises to pay *Pitfield*, or order, the sum of 200*l.* six months after date for value received; this note was indorsed by *Pitfield* to the plaintiff, who has brought this action against him as indorser; Upon the general issue this cause came on to be tried at *Guildball*, before *Lee* Ch. Justice, when this case was made for the opinion of the court, *viz.* That some time before the present action was commenced, *Hull* the plaintiff brought an action against *Scraiston* the drawer of the note, who gave special bail; that *Hull* recovered interlocutory judgment in that action against *Scraiston*, that thereupon *Scott* and *Ward*, who were his bail, paid off the debt and costs to *Hull*, which amounted to 220*l.* 15*s.* That thereupon the plaintiff executed an instrument between the plaintiff of the one part, and *Scott* and *Ward* of the other part, reciting the note, and that the plaintiff had recovered interlocutory judgment against *Scraiston* thereupon, and reciting that they the said *Scott* and *Ward* had purchased the note, and paid the said 200*l.* and costs, and in consideration thereof the plaintiff assigned over to them the note and the interlocutory judgment, with power of attorney to make use of her (the plaintiff's) name to sue the

the indorfor, and covenants in the common manner, not to do any act to hinder *Scott* and *Ward* the bail from recovering the money upon the note. It was also stated in the case in what manner the note was given, which was thus: *Scraiston* wanting money draws the note payable to *Pitfield* or order, who, upon *Scraiston*'s applying to him, lent him his name (as it is called) that is to say *Pitfield* indorsed the note, which being done *Scraiston* and *Pitfield* took the note, and applied to one *Russell*, agent for the plaintiff, to let *Scraiston* have money for this note, who thereupon lent *Scraiston* 187l. 18s.

This case was twice argued at the bar; first, in *Easter* term last, by Serjeant *Urlin*, Recorder of *London*, for the plaintiff, and Serjeant *Eyre* for the defendant, and in this term by Mr. *Clive* for the plaintiff, and Serjeant *Agar* for the defendant.

Two questions were made; 1st, Whether this note be not void by the statute of usury; and 2dly, If it be not void, whether the plaintiff can have this action against the indorfor, the bail for the drawer in the former action having actually paid the debt due upon the note and costs to *Hull*.

As to the first question, the court said there was no occasion to give any opinion, but they all declared they were strongly inclined to think that the note was void by the statute of usury; and the reason they gave for being so inclined was, that it seemed by the state of the case that *Pitfield* was privy to the contract between *Russell* the plaintiff's agent and *Scraiston*, and that it seemed as if *Pitfield* and *Scraiston* were to be considered together as creating a joint security to the plaintiff, for it appears by the state of the case, that *Pitfield*, *Scraiston*, and *Russell* the plaintiff's agent, were all present at the time of the transaction of giving the note.

As to the second question, the court were unanimous that the payment of the money to the plaintiff by the bail, for the drawer, was the same thing as if the drawer himself had paid it, and that the note was thereby absolutely discharged and satisfied; and that what is laid down by *Holt* in *Hill v. Lewis*, 1 *Salk.* 132. is good law, viz. That by law generally every indorfor is always liable as the first drawer, and cannot be discharged without an actual payment, and is not discharged by the acceptance of the bill (or note) by the indorsee; but by the custom this is restrained, viz. The acceptance is intended to be upon this agreement, *scilicet*, That the indorsee will receive it of the first drawer, if he can, and if he cannot, then that the indorfor will answer it; as if the first drawer be insolvent at the time of the indorsement, or upon demand refuses to pay it, or cannot be found; and the indorfor is not discharged without actual payment, until there is some neglect or default in the indorfor.

fee,

fee as if he does not endeavour to receive the money in convenient time, and then the first drawer becomes insolvent.

And the court resolved in the case at bar, that the indorser of a note is only a warrantor thereof that the drawer will pay it, and if he does not that the indorser will; and that it is the same thing whether the drawer himself paid the money or his friend, as the bail did in this case; and *Kellock v. Robinson*, Hil. 13 Geo. was cited by Lee C. J. and Denison, and not denied by the other two Judges, which was an action by the indorsee of a note against the indorser; and it appearing that the plaintiff after the indorsement had received of the drawer some part of the money due upon the note, Eyre Ch. Justice at Guildhall held, that the indorsee had thereby taken upon himself to give the drawer credit for the whole, and had discharged the indorser absolutely; and the plaintiff in that case was nonsuited. Judgment for the defendant, and the *postea* ordered to be delivered to him, and to have costs of a nonsuit.

2 Stra. 745.

If the indorsee receives part of the money upon a note of the drawer, the indorser is discharged.

Easter Term

17 Geo. 2. 1744.

John Leyburn Witham, Esq; Plaintiff in Error, and George Lewis, on the demise of Edward Earl of Derby, Defendant in Error.

GEORGE Lewis brought an ejectment in the King's Bench for 500 acres of land, 50 acres of meadow, 400 acres of pasture, 600 acres of wood and 500 acres of moss with the appurtenances in *Witber Slack* in the county of *Westmorland*, upon a lease made by *Edward Earl of Derby* aforesaid to *George Lewis* on the 19th day of *January* in the 12th year of his present Majesty for seven years from the 18th day of the same month of *January*; upon the issue of Not guilty, this cause was tried at *Appleby*, and the jury found a special verdict to the effect following, viz.

2

That

That King *Henry* the 7th being seised in fee of the premisses in question, on the 26th of *February* in the 4th year of his reign, reciting, that whereas the said King on the 27th day of *October* in the first year of his reign, had created *Thomas* then Earl of *Derby*, late Lord *Stanley*, for divers his services to the said King done, Earl of *Derby*, to be Earl of *Derby*, to him and the heirs male of his body, and that he might honourably maintain his state and dignity of Earl of *Derby*, the said King had given and granted to him and his heirs 20 l. *per ann.* out of the vicontiel rents of the county of *Nottingham* and *Derby*; and reciting, that whereas the said Earl of *Derby* had released to the King the said yearly annuity, therefore he the said King, for the more honourable support and maintenance of the state and dignity of the said Earl of *Derby*, gave and granted the manor of *Witherslack*, and the lands in the declaration mentioned, to the said *Thomas* Earl of *Derby* and the heirs male of his body, who entred and became seised thereof.

That *Thomas* Earl of *Derby* had issue *George* Lord *Strange*, who died in the life-time of his father, but left issue *Thomas* his eldest son: that *Thomas* Earl of *Derby* died seised, and that *Thomas* his grandson, after his death, entred and was seised thereof.

That *Thomas* the grandson being so seised in *Trinity* term, *anno* 5 *Hen.* 8. suffered a recovery with single voucher, wherein *James* bishop of *Ely* and others demandants, impleaded the said *Thomas* Earl of *Derby*, and demanded the premisses in question against the said Earl, whereupon it was adjudged that the said demandants should recover seisin of the premisses against the said Earl, &c. prout the exemplification of the record of the said recovery to them produced in evidence; and then they find that after the said recovery so as aforesaid prosecuted and had, the said *Thomas* Earl of *Derby* entred into the said premisses and was seised thereof.

(But *N. B.* The jury do not find that a writ of seisin was awarded or ever issued, or that the judgment in the recovery was ever executed).

But they next find that *Thomas* the grandson being so seised died, leaving issue of his body *Edward* his eldest son, who entred and became seised of the premisses as the law requires.

That *Edward* had issue male of his body *Henry* his eldest son, that *Edward* died seised, and that *Henry* entred into and became seised of the premisses as the law requires.

That *Henry* had issue male of his body *Ferdinando* his eldest son, and *William* his second son; that *Henry* died, and *Ferdinando* entred
O into

into the premisses and became seised as the law requires; that *Ferdinando* died seised in the life-time of his brother *William* without issue male of his body, leaving only three daughters, *Ann*, *Frances* and *Elizabeth*.

That *William* after the death of *Ferdinando* entred into the premisses and had issue *James* his only son.

And the jurors further find that after the death of Earl *Ferdinando* several controversies and disputes having arisen, as well touching the right and title of, in and to the several manors, lands and hereditaments of the said Earl, as also touching the portions and advancements of the said daughters: for determining the said disputes the same were referred to the arbitration of several noble persons, who made an award, by which the several disputes amongst them were settled; which award, at the desire of the said Earl *William* and the said three daughters, was afterwards established and carried into execution by an act of parliament made the 4th of King *James* the first, at the petition of all the contending parties; by which the manor of *Witberslack* (of which the premisses are parcel) amongst other lands is given and limited to the said *William* Earl of *Derby* for and during his life, and after his decease to *James*, son and heir apparent of the said Earl *William* and the heirs male of his body, and then to the second son of the said *William* and the heirs male of his body; and in default of such issue to the third, fourth, fifth, sixth and seventh sons of the said *William*, and the heirs male of their several bodies respectively and successively; and in default of such issue to Sir *Edward Stanley* for life, and after his death to the first, second, third, fourth, fifth, sixth and seventh sons respectively of the said Sir *Edward* in tail male; and in default of such issue to *Edward Stanley* of *Bickerstaff* in the county of *Lancaster* for his life, and after his decease to his first, second, third, fourth, fifth, sixth and seventh sons in tail male, in like manner as the lands are limited to Earl *William* and his sons, but in none of them is the limitation carried farther than the seventh son.

Then there is a proviso in the statute that saves all rights and reversions in the crown or others in like manner and plight as if the said statute had not been made, and also saves the rights of all other persons except such as took estates by the said act.

Then the jurors farther find, that Earl *William* being so seised of the premisses died seised, whereupon *James* his son entred by virtue of the estate limited to him by the said act of parliament.

That *James* died seised thereof, and that *Charles* his eldest son and heir male entred into the premisses and became seised thereof.

Then they find that Earl *Charles* by feoffment, bargain and sale in 1653. and fine with proclamations in *Michaelmas* term 1654. and warranty, for a valuable consideration sold the premises to one *John Leyburn*, Esq; and his heirs; by virtue whereof *John Leyburn* entred and became seised, and he being so seised, on the 19th of *January* 1679. died seised of the premises, and that the same descended to his son *Thomas Leyburn*.

Then they find that *John Leyburn Witham*, the plaintiff in error, derives his title to the premises from and under the said *Thomas Leyburn*, and that the said *John Leyburn Witham*, and all those whose estate he hath in the premises under the said *John Leyburn* and *Thomas Leyburn*, were in actual and peaceable possession of the said premises ever since the making of the said feoffment, bargain and sale, and levying the said fine until the 17th of *January* 1738.

Then they find that the said Earl *Charles* died in 1672. leaving issue *William-George-Richard*, and *James*, whereby the said *William-George-Richard* became and was Earl of *Derby*; that the said *William-George-Richard* died in 1702. without issue male in the lifetime of his brother *James*, who thereby became and was Earl of *Derby*, and died in 1735. without issue male.

Then they find that Sir *Edward Stanley* of *Enston* died in 1632. without issue male.

Then they find the descent of the present Earl of *Derby* from *Edward Stanley* of *Bickerstaff* in the act mentioned, and that the present Earl of *Derby*, the lessor of *George Lewis*, is heir male of the body of *Edward Stanley* of *Bickerstaff*, and also heir male of *Thomas* the first Earl of *Derby*.

Then, before the demise made to *George Lewis*, they find an actual entry made into the premises by the now Earl of *Derby*, and then make the general conclusion, whether the Earl had a right of entry or not, and refer it to the judgment of the court; and if they should be of opinion that he had a right of entry, then they find for *Lewis* the plaintiff below, if not, for the defendant *Leyburn* below.

At the trial of this cause the exemplification of the recovery 5 *Hen.* 8. was given in evidence, and at that time no objection was made to it; but the only doubt then which occasioned the finding this special verdict was, whether the entry of the defendant in error was lawful or not.

Which

Which depends upon this question, *viz.* Whether, notwithstanding the recovery suffered 5 *Hen.* 8. the feoffment and fine of Earl *Charles* in 1653 and 1654. made a discontinuance or not? for if they did, the entry of the present Earl the defendant in error was taken away.

But it was insisted on behalf of the Earl, that the feoffment and fine in 1653. did not discontinue his remainder, for that the reversion being ultimately in the crown protected it from such discontinuance.

To which it was answered that it did not, because a reversion in the crown to prevent a discontinuance, must be a reversion immediately dependant on the estate-tail attempted to be discontinued, which this is not; because by the recovery of the 5 *Hen.* 8. the old estate-tail was barred, and turned into a fee-simple descendible to Earl *Thomas* and his heirs general, as long as there were heirs male of the said *Earl* subsisting; and the reversion thereby left in the crown became only a mere possibility of reverter after the determination of such qualified fee, and consequently not within the protection of 34 *H.* 8. which extended only to estates tail *then* subsisting, which this was not; for that *stat.* only says that no feigned recovery *hereafter* to be had against tenant in tail of lands, whereof the reversion or remainder at the time of such recovery had shall be in the King, shall bind, &c. and as to the estate-tail created by the settlement confirmed by the *stat.* 4 *Jac.* 1. That it was only a partial estate-tail created out of the fee-simple gained by the recovery. 5 *Hen.* 8. and the reversion being left in the crown by that *stat.* in the same plight as it was before, it was in no sort made dependant upon or connected with the estate-tail then created, but left to depend, as it did before, on the fee-simple gained by the recovery. 5 *Hen.* 8. which might possibly subsist many generations after all the estates-tail created by that act were spent; and that therefore the fine and feoffment of 1653 and 1654. made a discontinuance of the remainder limited to the present Earl, as they could not, nor did at all affect the reversion of the crown, betwixt *which* and the remainder in tail there was no privity or dependance.

But upon this point, though argued three several times before the court of *B. R.* they gave no opinion, for upon arguing the case, the counsel for the defendant in error raised a new objection, *viz.* That no writ of seisin, or entry of the recoverors appeared upon the special verdict, and that as it was *not found*, it could not be presumed, and therefore the recovery was not good, and of consequence the entry of the Earl of *Derby* was lawful; and the court of King's Bench

Bench being of that opinion, gave judgment for *Lewis* the plaintiff upon that point only.

Upon which judgment the plaintiff *Leyburn* has brought this writ of error; and upon the argument it was in the first place insisted by his counsel that the same is erroneous, and that the writ of execution, and the execution thereof, though not expressly found by the jurors, ought to have been presumed, for these reasons:

1. From the exemplification of the recovery as found, it's antiquity of above 230 years, it's being entred on the rolls, the dignity and quality of the parties to it, and a fresh entry of Earl *Thomas* expressly found to be made *after* such recovery.

2. From the impossibility of any other proof of actual execution; for it is well known that amongst the rolls of recoveries of *that* and the preceding reigns, the award of the writ of execution is not entred or indorsed upon one in twenty of them, (as has been usually done of late years) and upon search in the proper offices, where the writs of execution themselves ought to be filed, not one of such antient writs is to be met with.

3. Because had any objection been made at the time of trial, to the recovery upon this matter that no execution appeared to be awarded or executed, the Judge of *nisi prius* it is apprehended would and ought to have directed the jury to find the execution of it, from the antiquity of the exemplification itself, and the possession of the Earls of *Derby* under it; and if so, it seems reasonable that the courts of law should draw the same legal conclusions, and make the same reasonable implications from facts themselves, which they would direct a jury upon their oaths to do.

4. From the sale itself by Earl *Charles* in 1653. and the acquiescence of his two sons Earl *William-George-Richard*, and *James*, successively for near fourscore years together.

5. From the bad consequences which may attend this judgment; for if this doctrine should be established, that the Judges are not to presume execution at this distance of time, it might shake the titles of great part of the property of this kingdom, which probably may depend on the validity of antient recoveries suffered before the *stat.* 34 *Hen.* 8. for if a jury (for any reasons peculiar to themselves) should think proper to insist upon evidence to support such antient recoveries, (which for the reasons above appears to be impossible to be laid before them) as no attainr or other remedy against them would lie in such case, all property, under these circumstances, might

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might be subjected to an arbitrary, and perhaps corrupt determination of a jury without any redress whatever.

And 6thly, From the length of possession transmitted from ancestor to heir in the *Leybourn* family, and so expressly found by the jury in a series of quiet, peaceable and uninterrupted enjoyment, for the compass of near 100 years together.

But admitting that the court of King's Bench ought not in strictness of law to have presumed the writ of execution as the jury have not expressly found it, yet it was in the 2d place insisted by the counsel for Mr. *Witham* that this is, at most, but an imperfect verdict, and that therefore no judgment ought to have been given thereon, but a *venire facias de novo*, that is to say, a new trial ought to have been awarded and granted, which the court of King's Bench, upon a motion for that purpose refused; because they were of opinion that a *venire facias de novo* can only be granted upon what appears to the court upon this record, viz. that unless it thereby appears that the verdict is so imperfect that the court cannot give a complete judgment upon it, it would be error to grant a *ve. fa. de novo*, 8 Rep. *Loveday's* case. And they were of opinion that it is not the verdict but the defendant's title that is imperfect, and they could not say, from any thing appearing in the verdict, that the jury had misbehaved themselves, and yet that must be the introduction to a *ve. fa. de novo*, as they said.

In answer to this it was now said by the counsel for Mr. *Witham* that 1st, It was the office of the jury to have found the fact of execution one way or the other, and not to have submitted that question to the court, because the court cannot legally presume either way, and they have misbehaved in that part of their office, the record therefore ought to be sent back to them to do their duty in this particular.

And 2dly, If complete justice cannot be done to the parties upon this record, it is apprehended a complete judgment cannot be given upon it; and the whole merits of this case depending upon the question, whether execution was awarded or not, as the jury have not with certainty found either way, but submitted it as a question to the court; and supposing the court cannot in strictness of law presume there was execution, surely they cannot determine there was not, when it is more reasonable to presume the other way; and therefore they prayed the judgment might be reversed, and that a *ve. fa. de novo* might be awarded.

But notwithstanding these reasons and arguments, the judgment of the King's Bench was affirmed, and a *venire facias de novo* was refused,

refused, according to the unanimous opinion of Lord Chancellor *Hardwicke* and all the judges, which was delivered to the following effect, by Lord Chief Justice *Willes*.

Lord Ch. Justice *Willes*: Two questions are made for the opinion of the Judges: 1st, Whether sufficient matter be found by the special verdict for the court to say this recovery as found, without seisin awarded or executed, is a good and valid recovery. 2^d, If not, whether by law, a *ve. fa. de novo* ought to be awarded?

A recovery found by a special verdict without any seisin given is invalid, and no bar; and a *ve. fa. de novo* shall not be awarded.

2 Stra. 1185. S. C.

The first question naturally produces two others; 1st, Whether a judgment in a recovery not executed, is of any force or validity? 2^{dly}, If not, whether this verdict has found sufficient for the court to intend it? As to the 1st of these questions there can be no doubt; it is a settled principle that a judgment in a recovery not executed has no manner of operation; *Shelley's case*, Sir *Wm. Jones* 10. Judgment in a recovery not executed, will not alter the nature of the estate: there is no case where there is the least insinuation to the contrary; this being so, let us consider the 2^d part of the question, whether execution can be presumed? the verdict finds the recovery only, not a word of any writ of seisin, and there is nothing more settled than that the court can intend nothing in a special verdict but what is found by the jury; *Hob.* 262. (who was as great a man as ever lived) expressly to this purpose; and there is this very good reason for it, the rule of law would otherwise be inverted, for *ad quæstionem facti non respondent iudices, ad quæstionem juris non respondent juratores*, 1 *Inst.* 155. b. therefore we are of opinion there is not sufficient matter found upon this verdict to intend this a good recovery. The next question then is, whether by law a *ve. fa. de novo* ought to be granted; this is a much more doubtful question; I will explain the nature of the *ve. fa. de novo*, and that will best shew the reason of our opinion; the counsel at the bar endeavoured to confound a *ve. fa. de novo* and a motion for a new trial, but they are very different things, they agree indeed in some things, but differ in many; they agree in this, that a *ve. fa. de novo* must be awarded in both, and that the court may or may not grant either of them; but they differ 1st in this, that a *ve. fa. de novo* is the antient proceeding of the common law, a new trial is only a new invention; the 1st is as antient as the law, when attainments were in use, but motions for new trials were introduced in this manner; the judgment in attainment was very severe, and the punishment excessive hard, and therefore to avoid that severity it was thought better to proceed in a milder way, and so motions for new trials were introduced; they likewise differ in this respect, that new trials are generally granted where a general verdict is found. a *ve. fa. de novo* upon a special verdict; but the most material difference between them

Plowd. 43. b.

them is this, that a *ve. fa. de novo* must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it; if the record be never so right; if the verdict appear to be contrary to the evidence given at the trial, or if it appear the judge has given wrong directions, a new trial will be granted; but it is otherwise as to a *ve. fa. de novo*, which can only be granted in one or other of these two cases; as 1st, If it appear upon the face of the verdict, that the verdict is so imperfect that no judgment can be given upon it; 2^{dly}, Where it appears that the jury ought to have found other facts differently, and it cannot be granted in any other case; the best way of explaining these rules, will be by instances, and I will mention two, upon the head of imperfect verdicts; *The Mayor and Corporation of Shrewsbury v. Corbett Kinaston*, about six years ago: that was a *mandamus*, whereupon there were pleadings to issue, a special verdict was found, and error brought, and it was insisted that neither upon the verdict, nor judgment, was there any damages taken, and therefore that it was so imperfect that a *ve. fa. de novo* must be awarded: the next instance was *Chalie v. Haswell* in February or March 1740. which was a prosecution for selling wine by retail, and upon the first opening it was found there must be a *ve. fa. de novo*, because of the imperfection of the verdict, the act of parliament it was founded upon having particularly mentioned retail measure, as quart, gallon, &c. and the verdict only found that he sold wine by bottles, without taking any notice of the measures in the statute, which was so imperfect, that the court could not give any judgment upon it, for no body could pretend to say of what measure the bottles were: as to the second head, where it appears upon the face of the record itself, that the jury ought to have found otherwise; I will likewise mention two instances, indeed not of so high authority as the other cases, but such as are undeniable; the 1st is in an action of trover; if the jury find a special verdict that the goods were demanded of the defendant by the plaintiff, and defendant refused to deliver them, a *ve. fa. de novo* ought to go, because the jury have found only the evidence of a fact, which they ought to have determined, for demand and refusal are only evidence of a conversion, and they ought to have found a conversion. The second instance upon this head is, the case of the corporation of *Maidstone* about the year 1738 or 1739. in *B. R.* there the jury found the evidence of a fact, which shewed they ought to have found the fact itself: Now try this case by these rules; it was not contended by the counsel in the argument of this case that the present verdict is imperfect, therefore it is plain there is sufficient found for the court to give judgment upon: The question therefore is, whether the jury ought to have found otherwise; and first it is said that it is found that *after* the recovery, *Thomas Earl of Derby* entred and was seised *prout lex postulat*, and therefore the jury ought to have found execution; 2^{dly}, That the jury have not found the contrary

2 Stra. 1124.

contrary, that there is no execution; and 3dly, They rely upon the length of time and possession: as to the 1st there is no evidence of the execution, not the least proof of it, *de not existentibus & non apparentibus eadem est ratio*, the case of *Awbery and Bridgwater*, Sir W. Jones 10. is a much stronger case than this; there it was pleaded that *Thomas* entred *secundum recuperationem præd'*, &c. and held that this was bad; much less will this finding do, which is only, that he entred *after* the recovery so as aforesaid had; besides, it is plain he did not enter by virtue of the writ of seisin, for the recoveror is to have the writ of seisin; this was before the statute of uses, and he would have had only a trust and no legal estate: as to the 2d objection there is much less weight in *that*, for to say that the jury ought to have found expressly the contrary, *that there was no execution*, would be to say they should find a negative, which, in my opinion, they cannot do in any case; to mention cases out of the books upon this head, would be rather to confound than explain; but the better authorities agree they cannot, *Hob. 262*. The case of *Duncombe v. Wingfield* is express that it would be against sense to enforce a jury to find a negative of *that*, that is not presumed except it be found; it is a maxim in divinity, that if a man tells any thing ever so true, if he does not know it to be true at the time he tells it, it is a lie; how then can the jury say it was not executed when there was no evidence of it; and as they have found this recovery, the presumption is that it was not proved there was any seisin; the 3d point insisted on is the length of time and possession; it is hard to say how this came about that they were permitted to continue so long in possession, perhaps it might be owing to the same reason which has occasioned this recovery being found in this manner, the point might not be thought of at all; I am very doubtful of this, and give no opinion; for these reasons we are all of opinion that this case does not come within any of the rules for granting *ve. fa. de novo*; but consider the circumstances of this case, in the first place this judgment is not conclusive, no harm done, the plaintiff in error may bring a new ejectment; upon this foundation there are many cases where new trials have been refused; but it is said, the defendant is poor, *that* will have no influence upon the judgment of the court, in a matter of law; 2dly, As far as you can you will look to the final right and justice of the case, there is not any pretence of right; plaintiff in error claims under a fine of 1653. a discontinuance does not give a man a right, so that if there be any hardship in the case it is upon the family of Lord *Derby*, who have been thus long kept out of the possession of this estate, which *Witham's* ancestor gave only 130*l.* for; this being so, it is a reason for refusing a new trial. *Salk. 644*. no new trial against the equity of the case 646, 647. new trial refused for omission of the party, because an honest debt, if a *cestui que trust* bring an ejectment against a wrong-doer, and the jury find for him, the court will not set it aside, because of the final justice of the case.

Cayhill *versus* Fitzgerald. B. R.

S. C. Ante 28.
Award.

1 Salk. 70.

2 Salk. 787.

Carth. 412.

1 Ld. Ray.

246.

Yelv. 137.

147. Talbot

v. Godbolt.

2 Mod. 231.

1 Ld. Ray.

533.

Styles 351.

2 Mod. 227.

2 Ray. 961.

THIS case was this term argued again by serjeant *Draper* for the defendant, and *Hume* the King's counsel for the plaintiff, when two objections were made to the award, by *Draper*, 1st, That it was not of the matter submitted; and 2^{dly}, That it was not mutual between the parties, as in the former argument, *ante* 28. and now the court gave judgment for the plaintiff, and held the award good in both these points.

Lee Chief Justice: This is debt on bond; the condition is, that *Geo. Fitzgerald* Jun. acting as attorney for and on behalf of *John Fitzgerald*, became bound to plaintiff to submit to the award of certain arbitrators to be made within such a time touching all matters in difference between the plaintiff *Cayhill* and *John Fitzgerald*, and defendant after *oyer* pleaded no award; plaintiff replied and set forth an award published and declared by the arbitrators, which was of and concerning the premisses in the condition of the bond specified, and that they thereby awarded that *Geo. Fitzgerald* should within ten days from the date of the award pay or cause to be paid to *Michael Cayhill* (the plaintiff) 298 l. 9s. 9d. and that *Cayhill* should take the same in full of all demands; and further, that each of the parties should sign, seal and execute a general release from the beginning of the world to the date of the bond, and then assigned a breach, and to this there is a demurrer and joinder; I own, when this case was first argued, I was inclined to think this award was bad upon reading *Carthew's* report 412. of *Bacon* and *Dubarry*; but upon looking into Lord *Raymond's* report of the same case, and also a manuscript report thereof, which I have since seen, I am now clear of opinion that this is a good award, and the case at bar is not to be differenced from *Bacon* and *Dubarry*; and so it appears in the pleadings in that case in 2 *Salk.* for if the award there had been general, as in this case, and not *ad usum eorum alterius* (which confined the same to the attorney) it would have been good; for it appears upon the record in this case, that the award has relation to what was submitted, for though not expressly mentioned in the award itself, yet it appears on the record that it is made of and concerning the premisses in the condition of the bond, for it is expressly averred so to be, in the replication; so *per tot' cur'*, judgment for the plaintiff, for this award is within the submission, is final and mutual.

Recovery refused to be amended.
Ante 35.

In the case of *Wynne* and *Wynne*, *ante* — the court of C. B. was moved for leave to amend; the 1st amendment desired, was to alter the words, *at which day* the vouchee appeared by attorney, to “*Before*” which

“ which day, to wit, on the 5th of May,” which was refused, because *per opin’ cur’* the vouchee cannot appear before the return of the writ of *sum’ ad warr’*, 1 *Leo.* — so it would be amending one error by making another. 2d amendment prayed was to alter the *teste* and *return* of the writ of entry, but refused, because against law, and there is nothing to amend by; as to the cases cited for the amendment of the *teste* in *Pigott*, they were taken by the court to be by consent, because by the rule in the first of them it appears to be so, and the others about the same time; most of the cases cited besides, were of amendments in the *returns*, but agreed *originals* were amendable by *stat. H.* — in their *teste*, where it is the misprision of the clerk only, and this, the cases cited only prove, but not amendable for the ignorance or nescience of the clerks, *Gage’s* case in *Co.* which they said had been denied to be law several times; and *Blackmore’s* case of amendments warrants this distinction, but here is neither misprision nor ignorance of the clerk, supposing *Gage’s* case to be law, for here is a proper *teste* and *return*, and as intended to be; and the court thought, from the release to lead the uses of the recovery, which is the only thing they could amend by, there appeared no intention of the parties that a writ of entry should be sued out sooner than it was. Rule for amendment discharged, *Pas.* 18 Geo. 2.

Box *versus* Day and his Wife. B. R.

THIS is an action of debt upon a bond which was executed by the wife of the defendant *dum sola*; the defendant craved *oyer* of the condition, which was in these words: Whereas a marriage has for some time been and now is declared and agreed upon, and is intended to be had between the above named *Thomas Box* and *Frances Middleton*, but the same, at the request of the said *Frances*, is to be deferred until the death of *John Middleton* her father; and the said *Thomas Box* and *Frances Middleton* have mutually engaged themselves not to intermarry but with each other; in consideration whereof, and for a provision for the said *Thomas Box*, in case the said intended marriage shall not take effect, and that the said *Frances Middleton* should intermarry with any other person, or die before the intended marriage, or refuse to marry the said *Thomas Box*, upon or immediately after the death of the said *John Middleton*, she the said *Frances Middleton* hath agreed that the said *Thomas Box* his heirs, executors, or administrators or assigns, in either of the cases aforesaid, shall have, take and receive out of the fortune and estate of the said *Frances Middleton* 1200 *l.* and interest, at 5 *l.* per cent. per annum from the date hereof: now the condition of this obligation is such, that if the above bounden *Frances Middleton*, her executors, administrators or assigns, do within one month after her

Condition of a bond not to marry any other but the plaintiff, and to pay 1200 *l.* in case she did so, or refused to marry the plaintiff within a month after her father's death.

She marries another man, her father being alive, the bond seems to be forfeited and the money payable.

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intermarriage with any person whatsoever, except the said *Thomas Box*, or within one month after the death of the said *John Middleton*, pay to the said *Thomas Box* his executors, administrators or assigns 1200*l.* with interest at 5*l.* *per cent.* from the date hereof; or if the heirs, executors or administrators of the said *Frances Middleton*, do within one month after the death of the said *Frances Middleton*, pay to the said *Thomas Box*, his executors, &c. 1200*l.* with interest, then this obligation to be void, or else to remain in full force; which being read and heard, the defendants plead that *John Middleton*, the father of the defendant *Frances*, is now living, (to wit, at such a place) and this they are ready to verify, &c. The plaintiff demurs generally to this plea, and the defendants join in demurrer.

This case was now argued by Mr. *Poole* for the plaintiff, that the plea is bad; and insisted that the defendants ought to have pleaded that none of the contingencies mentioned in the condition have happened, for if any of them have happened, *viz.* If *Frances Middleton* has married any other person but the plaintiff, then the bond is forfeited, unless the 1200*l.* and interest be paid; and he cited *Sayer v. Glean*, 1 *Lev.* 54. wherein it is said the law will supply the words, "which shall first happen" and relied on this case as directly in the very point.

Mr. *Henly* in arguing for the defendants, chiefly insisted that it is a rule laid down in 5 *Rep.* 21. *b.* 22. *a.* which has always been adhered to, that where a condition is in the disjunctive, the obligor has his option to perform which part of it he pleases, for the condition is made for the benefit of the obligor, and shall be taken beneficially for him, and therefore it is at the election of the defendants to pay the 1200*l.* and interest at the death of *John Middleton*, and concluded the plea was well enough.

Mr. *Poole* in his reply admitted, that where the condition of a bond is to do one act or another, or at one time or another, in that case the obligor has his election, and may perform one or the other, at either of the times, for the saving the penalty of his bond; and he said that no answer had been given to the rule laid down in *Sayer v. Glean*, that the law will supply the words "which shall first happen:" besides, that the rule laid down in 5 *Rep.* 22. *a.* is not as Mr. *Henley* has said, but the words of that book are, "and the reason and cause of the judgment was, that where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part;" but in the case at bar no part of the condition is become impossible by the act of God, but the marriage of *Frances* with the other defendant is her own act,

act, whereby the bond is forfeited; so he prayed judgment for the plaintiff.

Lee Chief Justice: I am clear of opinion that the defendant became liable to pay the 1200 *l.* upon any of the contingencies (mentioned in the condition) happening; but yet am doubtful, upon taking the whole together, whether this disjunctive condition has not given an option to the defendant the obligor as to the time of payment; and it is certain, that generally speaking, conditions are to be construed liberally in favour of obligors, therefore am inclined to think that it was the intent of the parties that she should have her election to pay the money either at the time of her marriage with any other man, or at the death of her father, and the rather, because of interest to be paid at 5 *l.* per cent.

Chapple Justice: It seems to me that the bond is forfeited and the money now payable, she having married another man, and this seems clear from the recital in the condition.

Dennison Justice: The terms of the condition are not very clear without taking into consideration the recital therein, whereby it appears that the intention of the parties was to marry after the death of *John Middleton* the father of the defendant *Frances*; I would not now be understood to give any conclusive or certain opinion but as at present advised; it seems to me that the intent of the parties was that in any of those cases which should first happen, then the money should be paid: and this case does not fall within the rule, which puts it in the obligor's power to pay the money at what time he pleases; if a condition be, that if the obligor shall go to *York*, or shall marry *A.* he shall pay 10 *l.* a month afterward; it seems to me that if he do either he shall pay the money; and what is said by Chief Justice *Bridgman* in the case of *Sayer v. Glean*, 1 *Lev.* 54. weighs very strongly with me.

Wright Justice *tacente*. The court inclining to give judgment for the plaintiff, the parties agreed before another argument, *ut audiui*.

Sale versus Crompton per nomen Compton. B. R.

THIS was a judgment by *nil dicit* (upon a warrant of attorney) in 1732. the entry whereof upon record was mistaken, it being *Compton* instead of *Crompton*. Now Sir *J. Strange* upon producing the warrant of attorney, and shewing the bill upon the file, were both against *Crompton*, and right; moved to have the record amended thereby.

Amendment.
The defendant's name in a judgment upon a warrant of attorney not amendable.

Vide Cro.
Car. 574.
2 Stra. 1209.
Sir S. C.

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Sir *Thomas Bootle* against the amendment, said, that what was prayed, was rather that the court would make a new judgment against another person than an amendment, for that here the record was of a perfect judgment, and no ways erroneous against *Compton*, and that to alter this judgment to *Crompton*, would be of the utmost ill consequence to purchasers. Sir *Danvers Osborne* since the entry of this judgment has purchased lands of *Crompton*, and an affidavit has been read to the court on his behalf that he did not know of, or ever heard of this judgment, and that he has paid the full purchase money for the land. He further insisted, that it was not in the power of the court to grant what was prayed at this distance of time, and that every amendment of a judgment generally ought to be made in the same term in which it is given; but supposing the court would do it, yet he insisted they could not now amend the dogget book, since the *stat. 4 & 5 W. 3.* and then it would be a judgment not doggetted, which would not affect a purchaser.

Sir *John Strange* in reply: That here was a warrant of attorney and the original bill to amend by at common law, and that therefore he had no need to pray in aid the statutes 14 *Ed. 3.* 8 *H. 6.* 9 *H. 5. c. 4.* which give power to the Judges to amend the record at any time while the same remains before them; besides, he said that 100*l.* was deposited in the hands of one *Keeling*, Sir *Danvers's* steward, (as appeared by affidavit) to be applied to pay off this judgment, so that Sir *Danvers* could not be injured by making the amendment.

But the rule to shew cause was discharged by the whole court. *Lee Ch. Justice* said, *Crompton* might have other estates, and for any thing that appears to us there may be other purchasers besides Sir *Danvers Osborne*, who may be affected if we should make the alteration prayed. *Chapple Justice* said: That it would be going further than ever was gone before; that as to the bill upon the file it was no bill in this cause; that this was a perfect judgment no ways defective, and that to alter the name to *Crompton* would be making a new judgment. *Wright* and *Dennison* justices were of the same opinion.

Power *versus* Shaw. B. R.

Prohibition to the spiritual court of Bristol for calling a woman a woman strumpet in the city of Bristol. **L**IBEL in the spiritual court of *Bristol* for calling a woman *strumpet*; and the libel sets forth that the word *strumpet* meant that the party libelling was a prostitute, and had been guilty of fornication; and now upon a motion by Mr. *Poole* for a prohibition, the suggestion was that there is a custom in the city of *Bristol* to punish whores by imprisoning, carting and whipping, and that the calling

calling a woman a whore is actionable *there* by the custom of the place, and that if the words were spoken, they were spoken in the city of *Bristol*; and Mr. *Poole* said, that if the meaning of the word *strumpet* was uncertain in its meaning, yet the libel had reduced it to a certain signification, and it was there tantamount to *whore*; and cited *Hotchkis v. Corbet*, Hil. 9 Geo. 1. *Cases in Law and Equity* 114. 2 Ro. Abr. 295, 296. *Bennet v. King*, Mic. 7 Anne. *Hart v. Holmes*, Mic. 8 Geo. 2. *N. B. Houblon v. Milner*, Lutw. 1039, or 1042. denied to be law by Lord *Hardwicke* in the case of *Hart* and *Holmes*. Rule to shew cause.

Wilkes versus Broadbent. In Error. B. R.

ACTION of trespass in the Common Pleas by *Broadbent* versus *Wilkes*, for breaking and entering the plaintiff's close at *A.* treading down the grass, subverting the plaintiff's soil, and for laying wood, slate, and other rubbish on the land, &c. *per quod* the plaintiff lost the use of his land.

2 Stra. 1224.
S. C.

A custom is void as being unreasonable, uncertain, and favouring too much of arbitrary power, and tending to make of a manor a judge in his own cause.

The defendant as to all the trespasss in the declaration, except the breaking and entering the close, treading down the grass, subverting the soil, and laying wood, slate and coals, &c. pleads Not guilty; and as to the rest of the trespasss (not covered by the Not guilty) justifies that the plaintiff ought not to have his action against him, because he says, that the said close wherein the said trespasss is supposed to be done, lies in the manor of *Halton* in the parish of *Temple Newsam* in the county of *York*, and for time out of mind has been, and is demisable by copy of court roll, and that Lord *Irwin* is seised of the said manor whereof the said close is parcel, and that from time out of mind, there have been divers parcels of land in the said manor, which at the time of the supposed trespasss were freehold, under which freehold lands there were coals; then sets forth the custom that the lord of the manor for the time being, and his tenants of the collieries for time out of mind have used to sink pits within the freehold lands for working the same to get coals, and for all the time aforesaid have used to throw, place, &c. with shovels, spades, &c. earth, stones, coals, &c. coming out of the said collieries, together in heaps upon the land there near to such pits, such land being customary tenement and parcel of the manor, there to remain and continue, and to place, lay and continue wood there for the necessary use and making of the said pits, and to take and carry away from thence with waggons, carts, &c. part of the coals laid there, and to burn and make into cinders other part of the coals laid there during and at the will and pleasure of the said Lord or his tenants; then the plea sets forth the Lord *Irwin's* title, and the tenant's title, who justifies under him.

The

The plaintiff replies and traverses the custom, and thereupon issue is joined, which was tried at *York* by a special jury, and a verdict was given for the defendant for the custom.

Upon a motion in arrest of judgment in the Common Pleas the custom was there adjudged to be void, and that court gave judgment for the plaintiff upon the insufficiency of the bar, and awarded a writ of inquiry of damages, the defendant having in his plea acknowledged the trespass, and thereupon final judgment for damages and costs was entred for the plaintiff, and as to the other issue upon the Not guilty (as to the other part of the trespass) the entry was that the defendant *eat inde Sine die*.

Hereupon a writ of error was brought by the defendant below, and upon the general errors assigned this case was argued last term by *Tho. Bootle* for the plaintiff in error, and by Mr. serjeant *Prime* for the defendant, who began first although he was for the defendant in error; it was a second time argued this term by serjeant *Bootle* for the plaintiff in error, and by Mr. *Hume Campbell*, the King's counsel for the defendant; and lastly, it was argued by Sir *John Strange* for the plaintiff in error, and by serjeant *Belfield* for the defendant, in *Michaelmas* term 18 Geo. 2.

Two points were made; 1. Whether this was a good and reasonable custom, or *lex loci*; and 2. Whether the entry of the judgment be made rightly; for if the custom be good, or the entry be not legally or rightly made, in either case the judgment is reversible.

Judgment of
the court.

In *Easter* term 18 Geo. 2. *Lee* Chief Justice delivered the opinion of the whole court of King's Bench, that this custom was unreasonable and void, and consequently the verdict found for the custom, could not hinder the Common Pleas from giving judgment for the plaintiff there, the defendant *there* by his plea having confessed the trespass, for it is not to be doubted but the finding of the jury is void, if the custom be bad in point of law. The Chief Justice said, the custom was void for these reasons; 1st, Because it is very uncertain, for the word *near* is of great latitude, and too loose to support a custom, such as this is pleaded to be; 2^dly, Because it was very unreasonable, for it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and favors much of arbitrary power, being pleaded to be at the will and pleasure of the Lord, and to do it as often, and when he pleases; and if a custom be unreasonable no length of time can make it good; *quia in consuetudinibus non diuturnitas temperis sed soliditas rationis est consideranda.* *Co. Lit.* 141. a. and what was said at the bar touching the public

public utility of coal pits to the realm cannot be considered, for the pits may be worked without this custom, for aught that appears to the contrary; the case in 1 Roll. Abr. 560. pl. 1. differs from the case at bar, so does 3 Lev. 160. and 1 Lev. 231. As to what was said at the bar that this being a question between the lord and his copyholders, the custom might have a reasonable commencement, and that the lord might grant his lands to the copyholders charged as he thought fit, and that a copyholder, in the eye of the law, was but a mere tenant at the will of his lord: I answer that he has more than an estate at will, for he has an inheritance *ad voluntatem domini secundum consuetudinem manerii; et consuetudo est altera lex*, 4 Rep. 21. And to support this custom would be to take away the whole benefit of the land granted originally to the copyholder by the lord; and it is a void custom and contrary to law, that the lessor shall have common *encounter son demise quia est part del chose demise*, Palm. 212. and this custom being pleaded to be at the will and pleasure of the lord, tends to make him judge in his own cause, which the law will not endure. Lit. sec. 212.

As to the objections which have been taken to the entry of the judgment, we are all of opinion, that it is very rightly entred, it appears by the defendant's plea, that he has confessed the cause of action; if therefore the custom be void, as it certainly is, the jury's finding for the custom cannot hinder the court from giving judgment. Carth. 372. or 307. 27 Ed. 4. Bar. fo. 46. 2 Roll. Abr. 99. The judgment is rightly given upon the defendant's plea, and not upon the verdict; *nullo respectu habito veredicto*. The setting aside the verdict would have been wrong: this is not like the case in Carthrew, this is such a verdict as does not stop the court from awarding a writ of inquiry of damages.

The judgment of the Common Pleas was affirmed by the whole court. Vide Davis 39. b. 4 Rep. 21. 2 Ric. 2. 3. 21 Ed. 4. 8. b. Lit. Rep. 233. Hutt. 101. Het. 126. Co. Lit. 59. 1 Leo. 11. 2 Roll. Abr. 266.

S

John

John Martin, on the demise of Thomas Tregonwell, Esq; Plaintiff in Error, *versus* John Strachan the younger, Esq; and Luke Harrison Defendants.

Ejectment of lands in Milton in the county of Dorset.

Ante.

JACOB Bancks, Esq; upon the 27th day of February 1737. died intestate, and without issue, seised of the manor of *Milton Abbas* in *Dorsetshire*, and of divers other lands and tenements in the same county, of the yearly value of 3000 *l.* which were the antient inheritance of the family of *Tregonwell*, of which family the said *Jacob Bancks* was, by *Mary* his mother, who was a *Tregonwell*.

The defendant *Strachan* (though he was born in *England*) was of *Swedish* parents; and the defendant *Harrison*, as his agent and servant, having upon the decease of the said *Jacob Bancks* got into the possession of his estate, *Thomas Tregonwell*, who claims as heir at law to the said *Jacob Bancks* on the part of the mother, *viz.* by the said *Mary*, who was a *Tregonwell*, brought this ejectment to try his title to the said manor and lands, to which the defendants pleaded the general issue *Not guilty*.

This cause was tried at bar in the court of King's Bench in *Michaelmas* term 1738. when the jury found a special verdict, which is very long, by reason that several deeds and settlements are found thereby, and set forth therein *verbatim*, but the substance thereof is to the effect following, *viz.*

That the lands in question were the inheritance of *John Tregonwell*, Esq; the great grandfather of the lessor of the plaintiff *Thomas Tregonwell*.

That this *John Tregonwell* died seised thereof in the year 1639. leaving issue two sons *John* and *Thomas*.

That *John* the son had issue *John* the grandson; and that the lands upon the decease of *John* the son, descended to *John* the grandson; who having issue only two daughters *Mary* and *Catharine*, he, in the year 1680. by a settlement dated the 3d day of *June* in that year, made upon the marriage of *Mary* his eldest daughter with *Francis Lutterel*, Esq, settles great part of his estate (after some limitations in part to the use of himself and *Jane* his wife as a provision for themselves for life) to the use of the said *Francis Lutterel* for life, remainder to the said *Mary* for life, remainder to her first
and

and other sons of that marriage in tail male, remainder to her first and other sons by any second or other husband in tail male, remainder to his second daughter *Catharine* for life, with like remainders to her first and other sons in tail male, remainder to the daughters of *Mary* in tail, remainder to the daughters of *Catharine* in tail, and in default of such issue, *limits the reversion in fee to his own right heirs.*

The other part of his estate he limits by the same settlement to his daughter *Catharine* for life, with remainder to her first and other sons in tail, remainder to his eldest daughter *Mary* for life, remainder to her first and every other sons in tail male, with the like remainders for the daughters of *Catharine*, and afterwards of *Mary* in tail; and for default of such issue, *limits likewise the reversion in fee of this other part of his estate to his own right heirs.*

The jury find that *John Tregonwell*, the father of *Mary* and *Catharine*, died the 29th day of *January* 1680. and that *Catharine* his second daughter died the 11th day of *August* 1683. under age and unmarried, and that thereupon *Francis Lutterel* and *Mary* his wife, in right of *Mary*, entred into that part of the lands also, which was limited to the use of *Catharine* and her issue, as well as *that* they had before entred into, and were seised of the other part of the lands which was limited to *Mary* and her issue; and that upon the decease of *Catharine*, the reversion in fee of the whole estate (of which, during the life of *Catharine*, *Mary* was but a coheir with *Catharine*) descended to *Mary* as right heir of her father.

They find that the said *Francis Lutterel* died leaving only two daughters, and that the said *Mary* his widow, after his decease, married with Sir *Jacob Bancks* a *Swede* by birth, by whom she had issue only two sons, both born in *England*, to wit, *John* and *Jacob*, and that *John* the eldest survived his mother, and died without issue in 1725. and that thereupon the said *Jacob Bancks* the second son entred and was seised as tenant in tail with the reversion in fee in himself, which reversion in fee descended from *John Tregonwell* the father of *Mary*, to *Mary*, and from her to her eldest son *John*, and from him to her second son *Jacob*, so that this reversion was in *Jacob* by descent *ex parte maternâ*.

Tenant in tail
by purchase
secundum
formam doni,
with the re-
version in fee
in him, both
ex parte ma-
ternâ,

They find that *Jacob Bancks* being so seised, did in *Michaelmas* term 1725. suffer a common recovery in the usual form, having by a deed of bargain and sale inrolled made a tenant to the *præcipe*, and by the same deed declared that such recovery should be and enure to the use of himself and his heirs, and died without issue.

suffers a reco-
very to the
use of his own
right heirs.

They

The lessor of
the plaintiff's
pedigree.

They then find the pedigree of *Thomas Tregonwell* the lessor of the plaintiff in error, to wit, that he is the great grandson and heir of *Thomas Tregonwell*, who was, as before mentioned, the second son of the first named *John Tregonwell*, which *John* died in the year 1639. leaving issue as before mentioned *John* his eldest son (who was the grandfather of the said *Mary* the mother of *Jacob*) and also the said *Thomas* the plaintiff's great grandfather; so that the lessor of the plaintiff is undoubtedly heir to the said *Jacob Bancks* on the part of the mother, and intitled to his estate as such, in case the lands are descendible to his heir on the part of the mother.

The defend-
ant's pedi-
gree.

The jury next find the pedigree of the defendant *Strachan*; viz. That *Lawrence-Bengston Bancks* an alien and Swede, had issue by *Christina* his wife an alien, one son, the before named *Sir Jacob Bancks*, and three daughters named *Brita*, *Ingri*, and *Anna Christina*, all aliens born in *Sweden*; and that *Brita* the eldest daughter married one *Peter Bohmgreen*, an alien and Swede, and had issue by her said husband four daughters, namely, *Maria-Christina*, *Brita*, *Christina*, and *Margaretta*, all aliens and Swedes, and died leaving no other issue: and that the said *Ingri* was married, and had issue, whose names are unknown to the jury, and are all aliens and Swedes, and died leaving such issue who are now living in *Sweden*; and that the said *Anna Christina* is dead without issue; and that the said *Maria Christina* and the said *Brita*, daughters of the said *Brita* by the said *Peter Bohmgreen*, are living; and that the said *Christina*, daughter of the said *Brita* by the said *Peter Bohmgreen*, was married and had issue whose names are unknown, and who are all aliens and Swedes, and is since dead, leaving such issue who are now alive.

They find that *Margaretta*, the fourth daughter of the said *Peter* and *Brita Bohmgreen*, was married in the county of *Middlesex* to one *John Strachan* an alien and Swede, and had issue by her said husband one son, namely, *John Strachan*, Esq; the defendant, who was born on the 17th day of *March* 1707. at the city of *London* within the Kingdom of *Great Britain*; and that the said *Margaretta*, mother of the said *Mr. Strachan*, died in *February* 1726. leaving the said *Mr. Strachan* her only son.

They find that the said *Lawrence Bengston Bancks* and the said *Christina* his wife, and the said *Sir Jacob Bancks* their son, and the said *Brita*, *Ingri*, and *Anna Christina* their daughters, and the said *Peter Bohmgreen*, and the said *Christina* and *Margaretta* (mother of the said defendant *John Strachan*) were all aliens and Swedes, and so continued to the times of their respective deaths: and that the said *Maria-Christina* and the said *Brita*, the daughters of the said *Peter* and *Brita Bohmgreen*, and all the issue of the said *Ingri*, sister of the said *Sir Jacob Bancks*, and all the issue of the said *Christina* (daughter of the said *Peter* and *Brita Bohmgreen*) are aliens.

The jury having thus found the facts, conclude to the judgment of the court, whether upon the whole, the entry of the plaintiff into these lands was lawful or not; and if the court are of opinion that it was lawful, then they find for the plaintiff; but if the court are not of that opinion, then they find for the defendants, upon this special verdict.

The general question was, whether the lessor of the plaintiff, who claims as heir *ex parte maternâ*, is intitled.

It was argued for the plaintiff that he was well intitled to recover; 1st, Because the rule of law is clear that an estate of one dying seised by descent *ex parte maternâ*, can descend to none but the heir *ex parte maternâ*: this is founded on natural justice, that an estate should go to the family and blood from whence it came, where the owner has not himself thought fit to give it from them.

2^{dly}, Because this estate was originally the inheritance of the mother of *Jacob Bancks* and her ancestors, and therefore if there has been no interruption of the course of descent, it must now descend to *Mr. Tregonwell*; the only interruptions insisted on, are the settlement in 1680. and the recovery and deed of uses in 1725.

As to the former, they insisted, it was only a temporary interruption of the possession by the particular estates carved out of the fee, but the inheritance was still left to descend *ex parte maternâ*; and whenever those particular estates should determine, whether by deaths of the parties, or by bar or extinguishment of them, the possession would return to the old inheritance again.

And as to the recovery and deed of uses (they said) they only determined and barred the particular estates, and consequently let the reversion in fee into possession in the same condition and quality as when in reversion, and therefore (they argued,) could not alter the nature of the antient use, or descendible quality of it.

And they said that this is clearly the case of a fine levied by tenant in tail, who has the reversion in fee in himself, it having been settled that such a fine extinguishes the estate-tail, and lets the old reversion into possession; nor is there any material difference between a fine and recovery, they are both universally held to be bars (so far as their respective powers reach) of the particular estates, and conveyances of their own inheritances in fee.

For the defendants it was argued, that the lessor of the plaintiff as heir *ex parte maternâ* had no title; for that *Jacob Bancks*, tenant

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in tail by purchase *secundum formam doni*, by the common recovery to the use of himself in fee, acquired a new fee descendible to his own right heirs general, and that the title under the settlement was thereby destroyed; they said it was true indeed that if one so seised had made a feoffment to the use of his own right heirs, it would have worked no alteration but been the same use, according to *Co. Lit.* 13. 3 *Lev.* 406. *Salk.* 590. but that is only in case of a descent, whereas the estate *Jacob Bancks* took under the settlement was as a purchaser *secundum formam doni*.

It was objected for the defendants, that there is a very material difference between a recovery and a fine; 1st, That a recovery not only bars the estate-tail, but all the remainders after it.

Poph. 5.

2^{dly}, That a recovery is the proper conveyance of a tenant in tail with remainders over, and therefore operates as a grant from the tenant in tail, and that the recoveror has a fee, and comes in under tenant in tail in the *per* as his grantee, and therefore as a purchaser.

3^{dly}, That the estate is continued and enlarged by the common recovery.

In answer to the first objection it was said by the plaintiff's counsel, that the distinction between a recovery and a fine is immaterial, because the distinction affects only the extent of the bar or extinguishment, but not the manner of the operation of those instruments; it proves the recovery to be a bar or extinguishment of the estates-tail both in possession and remainder, but doth not prove it is less a bar or extinguishment of either; and the bar or extinguishment of both by the recovery, as much lets in the reversion in fee after both, as the bar or extinguishment by fine of *one* lets in the reversion in fee dependant on that *one* only.

Nor can the above distinction be applicable to the case of a recovery by tenant in tail with an immediate reversion in fee in himself, and it seems extremely difficult to maintain that in such a case a fine would operate to the old use and go *ex parte maternâ*, but that in the case of a recovery it operates to a new use only, because a recovery will bar or destroy an intermediate remainder in tail; and they contended for the defendant, that whether *Jacob Bancks*, in the present case, had levied a fine or suffered a recovery to the use of himself in fee, they ought either of them to have had the very same operation of the other, and the very same effect to let in the old reversion to descend *ex parte maternâ*.

It

It was said by the plaintiff's counsel in answer to the second objection, that it would be to make the recovery operate not as a bar to the particular estates-tail in possession and remainder, (which is the sense and language of all the books) but as a bar to *Jacob Bancks's* own reversion in fee, which is absurd; nor indeed is a recovery in any other sense a grant from the tenant in tail, than as it is a common assurance by which he may bar those particular estates, and acquire and convey the fee-simple in possession; but it is no less such an acquisition, if he gets it by barring the intermediate particular estates and letting in his own fee into possession, than if it could be said to be a grant of the estate-tail itself to himself in fee: but whatever might be the case where the estate-tail in possession, together with the remainder and reversion is in others; yet where the tenant in tail in possession has also the reversion in fee (they insisted) the recovery operates as a conveyance of the reversion, and as a bar of the intermediate estates.

That at most a recovery is not a sort of conveyance more proper to bar remainders, than a fine is to bar an estate tail alone; nor can the recoveror in a recovery come *in* more under the tenant in tail, or his estate-tail, or be more properly a grantee from him of the estate-tail, than the conusee in a fine is under the conusor; and yet that notion clearly doth not prevent the estate-tail from merging in the fee in this latter case.

As to the 3d objection, that the estate-tail is continued and enlarged by the recovery, the plaintiff's counsel said, that this, at best, is but a very inaccurate manner of speaking, if not unintelligible and absurd, since an estate-tail cannot continue longer than the issue *per formam doni*; and a fee-simple cannot with any propriety be called an enlarged estate-tail. The only reasonable sense of such expressions is, that the tenant in tail has, by exercising the power, given him by the law, of barring the estates-tail, become possessed of the absolute fee in possession: but in this sense it makes out the plaintiff's case, not the defendants; nor is this any other sort of enlargement of his estate, than a surrender of a tenant for life to the remainderman in fee is an enlargement of the remainderman's estate; and is more properly, therefore, an enlargement of the fee-simple, by sinking the particular estate, than an enlargement of the particular estate, which is absolutely destroyed.

Nor doth this manner of considering the recovery in the least injure the absoluteness of that power which the law gives the tenant in tail over the estate, because he acquires as much this way, as the other, with this advantageous circumstance, that it keeps the estate in its natural channel, and prevents this act done for one purpose only,

only, from enuring to another which he never thought of, and which if he had, he might, and probably would have avoided; and for these reasons the counsel for the lessor of the plaintiff prayed that the judgment given by the court of King's Bench might be reversed.

After time taken to consider, judgment for the plaintiff.

Tenant in tail by purchase per formam doni ex parte maternâ, with reversion in fee in him by descent ex parte maternâ, suffers a common recovery to the use of himself in fee, the lands shall descend to his heirs general and not to the heirs ex parte maternâ. *Curia:* This is an ejectment of lands in *Milton* in the county of *Dorset* upon the demise of the heir of *Jacob Bancks* on the part of his mother; upon Not guilty the jury have found a special verdict, whereupon the short state of the case is, That *Jacob Bancks* tenant in tail by purchase *secundum formam doni* (under a marriage settlement made in 1680. by an ancestor) *ex parte maternâ*, with reversion in fee to himself by descent *ex parte maternâ*, suffers a common recovery to the use of himself in fee; and whether this fee shall descend to the heir of *Jacob Bancks* *ex parte paternâ*, or *ex parte maternâ*, is the question; and if it shall not descend to his heir on the part of his mother, there is no title found for the lessor of the plaintiff, and the possession of the defendants is sufficient to intitle them to judgment.

We are all of opinion that judgment ought to be for defendants, because *Jacob Bancks* took by purchase under the settlement, and not by the descent.

Purchase,
what it means.

* A lord who takes by escheat can hardly be said to take as a purchaser or by descent.

The word *purchase* in common sense means no more than when a man gives money for any thing; but in a legal sense every man is a purchaser of an estate who does not take it by descent*; and whenever a man gains a new estate he is said to take it by purchase; so a man may take as heir of another and yet be a purchaser; as if lands be granted to *A.* remainder to the right heirs of *B.* the heir of *B.* takes by purchase and not by descent, because *B.* had nothing in him, for nothing can descend to a man from a father who had no estate in him.

Jacob Bancks having the estate-tail in him by purchase, and the reversion in him by descent, *both* on the part of the mother, is what makes the dispute in this case.

Before the statute *de donis conditionalibus*, a man seised to himself and the heirs of his body had a fee conditional, and as soon as he had issue the condition was taken to be performed, and he then had an absolute fee, which he could sell, and thereby disinheret his issue; to prevent which, the statute *de donis* was made; and for a long time

time was thought to be a good law, but in time great inconveniences ensued from it; the power of the barons was thereby greatly increased, it hindered the King of his forfeitures, younger children could not be provided for, nor money raised under the greatest necessities or misfortunes of tenants in tail; it was in vain to endeavour to get the house of lords to repeal this statute for the reason above, and therefore mankind looked out for some other method of avoiding the evils it had introduced; and about 200 years afterwards in the time of *Edward* the 4th, (who was a wise prince, though he had some human failings) the judges, who in all ages have set their faces against perpetuities, introduced common recoveries to bar the issue and remainders in tail (which have now been in use near 300 years) under a notion or pretence that a common recovery was implicitly excepted out of the statute *de donis*, and that the issue in tail was intitled to a recompence in value; but this is a strange construction, and seems to me to destroy the very intent of this statute; and whenever reasons have been attempted to be given for common recoveries being bars, or excepted out of the statute *de donis*, strange absurdities appear; every body allows the remainder-men are barred thereby as well as the issue in tail, and yet the recompence over in value does not extend to remainder-men; besides, the recovery over in value is against an officer of the court, who is the common vouchee, and this part of the process is a mere fiction; whoever therefore attempts to put these feigned recoveries upon the same foot with true and real recoveries upon title, will run into absurdities.

Why and when common recoveries were first introduced.

Whoever endeavours to explain common recoveries upon any other principles than that they are now become common assurances, will run into absurdities.

To say they were excepted out of the statute *de donis*, destroys at the same time the very intent thereof. And as to the recompence over in value to the issue it is a mere fiction; and no body pretends it extends to a remainder man, who is equally barred by a recovery.

We think common recoveries are common assurances with the consent of the parties, and are not to be compared to a judgment or proceeding in any other real action; 1st, Because now by long custom and usage they are become common assurances; 2^{dly}, Because they are suffered by consent of the parties; and a remainder can be barred upon no other principle than this, that a common recovery is a common assurance. 5 Rep. 40. a. b. *Piggott*, who was as able a conveyancer as any man of the profession, has confounded himself and every body else that reads his book, by endeavouring to give reasons for, and explain common recoveries. *Piggott* 18, 19, 20, 21. I only say this to shew that when men attempt to give reasons for common recoveries they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense. They have been in use some hundreds of years, have gained ground by time, and we must take them as they really are, common assurances. * I only deliver this as my own * Lord Ch. notion of recoveries, leaving others to their own judgment and opinion.

Lord Ch. Justice Willes.

Piggott 21.

Now if what *Piggott* says be true, that the recoveror comes in, in continuance of the estate-tail, and that the recovery enlarges the estate-tail, which by supposition of law has perpetual continuance, then *Jacob Bancks's* reversionary interest could never come into possession; but whether the recovery discontinued, barred, annihilated, or conveyed the estate-tail, I think it is the same thing.

Our opinion is, that *Jacob Bancks* by the common recovery conveyed a fee to the recoveror, and as there cannot be two fees, the reversion in fee comes too late, so that it was not the reversion that he conveyed; and we are of opinion that the uses arise out of the estate-tail which *Jacob Bancks* had by purchase originally *per formam doni*, and not out of the reversion; and that after his death the lands in question descended to his heirs general, and not to the heirs *ex parte maternâ*, because he took the estate-tail by purchase. Judgment for the defendant.

N. If *Jacob Bancks* had been tenant in tail by *descent ex parte maternâ*, and suffered a recovery to the use of himself in fee; *Quære*, if the lands would not have descended to his heir *ex parte maternâ*? *Abbot versus Burton*, *Salk.* 590.

Rex *versus* The Inhabitants of Luffington. B. R.

Order of sessions must adjudge, and not state the evidence only.

AN order of two justices to remove *Elinor* the wife of *William Hellier* from the parish of *Simonsbury* to *Luffington*, as the place of her husband's last legal settlement, was confirmed by the sessions; and now upon removing the order of sessions, it is thus stated specially, *viz.* Upon hearing the appeal made by the parish of *Luffington* to an order for removing the said *Elinor* from the parish of *Simonsbury* to *Luffington* as the place of her husband's last legal settlement, it appeared to this court, and this court doth adjudge it to be true, that *William Hellier* about 18 years ago was married to *Mary Hanbury* by a person in a black gown and a band, whom they took for a clergyman, but since have been informed was a layman; that the church matrimonial service and the ring were used in the ceremony, that it was in a private house, that they lived together nine or ten years; that on the 10th of *June* 1742. the said *William Hellier* was married to the said *Elinor* at S. by a clerk in holy orders, and that this marriage was (in the life of the said *Mary*) by licence, whereupon the sessions confirmed the order of two justices. But *per totam curiam*, the order of sessions was quashed, because it does not adjudge that the first marriage was really a marriage or not, but only states evidence of a marriage; and they said they would not give any judgment whether the first

marriage was good or not, but that the sessions ought to have determined that matter, and if they had judged wrong, this court would have set them right.

Trinity Term

17 & 18 Geo. 2. 1744.

Anonymous. B. R.

IN an action of covenant upon a lease the breach assigned was for non-payment of rent, and not repairing the premises; it was now moved that upon payment of what shall appear due for rent, proceedings as to *that* shall stay. *Per curiam*, This has often been done, so let it be referred to the master.

Covenant for non-payment of rent and not repairing, referred to the master as to rent, and on payment thereof process to stay as to that.

Rex *versus* Carroll, Esq; a Barrister. B. R.

AN information for a misdemeanor was granted last term against the defendant upon the affidavit of *Murphy*; and in the vacation before this term *Carroll* indicted *Murphy* (the prosecutor of the information) for perjury in his affidavit; and now it was moved for an attachment against *Carroll* for a contempt in endeavouring to evade the justice of this court; but *per curiam*, as this Mr. *Carroll* has found credit with the grand jury, it would be too much for us to grant an attachment against him; but they said this was a practice that but too often happened, and wished there could be some method found out to put a stop to it; and that in the case of *The King versus Rhodes*, the defendant was indicted for forging a will while the validity thereof was under a proper examination before a court of Delegates; and when the indictment came on to be tried before Lord *Raymond*, he refused to try it; and the court in the present case granted a rule for an attachment against one *Redman* for threatening *Murphy* the prosecutor with danger of his life, and saying that he would be hanged.

Attachment against one for threatening a prosecutor with danger of being hanged, but refused against the defendant, who indicted the prosecutor for perjury in his affidavit, on which the information was granted.

Low

Low *versus* Newland. B. R.

Amendment
of replication
from de in-
juria sua pro-
pria to
molliter manus
imposuit.

ASSAULT and battery; defendant pleaded *son assault demesne*; plaintiff replied *de injuria sua propria*; and now moved to amend his replication by replying *molliter manus imposuit*; the pleadings being all in paper and not entred on record, the court granted the motion, saying there could be no inconvenience.

Rex *versus* The Vicar and Churchwardens of Froom
Selwood. B. R.

You cannot
move for your
argument for
a matter of
course in the
paper in B. R.

NOTA, This was a cause in the paper, but only a word of course which was opened, and judgment prayed therein by Sir *John Strange*, King's counsel, who had precedence next to the attorney general; after which *Chapple* Justice (*absente Lee* Ch. Justice) called to Sir *John* to move, which he accordingly did, and immediately after called to him to make a second motion, telling him that the first motion he had made was for his argument; but the gentlemen at the bar objected to this, so Sir *John* did not move for his argument: but the court said it was the rule and practice in the Common Pleas to move for your argument for every cause in the paper of course; and so it certainly is; but it is not so in *Banco Regis*.

Rex *versus* The Mayor of Wigan. B. R.

Mandamus to
the mayor of
Wigan to
give the key
of the town-
hall to the
lord of the
manor to hold
his leet there
refused, tho'
the same had
been usually
held there.

DOCTOR *Bridgman* rector of *Wigan*, as lord of the manor claimed to hold a court-leet, at which the in-burgessees of *Wigan* are obliged to attend to make a jury, which they have neglected and refused to do at two courts, by reason whereof no business could be done; and therefore the court last term, upon the rector's application, granted a *mandamus* to oblige them to attend; this court-leet having been usually holden in the town-hall of *Wigan*, which belongs to the corporation, the mayor refused to permit the rector to have the use of the town-hall; and therefore it was now moved by Sir *Thomas Bootle* and Mr *Starkie* for a *mandamus* to the mayor, to oblige him to deliver the key of the hall to Doctor *Bridgman*, to hold the court-leet there, and insisted that the former *mandamus* for the burgessees to attend the leet would be of no use, if they could not have the use of the town-hall.

Chapple Justice: I can see no objection why we should not grant a rule to shew cause.

Dennison

Dennison Justice: I never knew such a *mandamus* as this granted; the lord of the manor may hold the leet in what place he pleases in the manor, and the burgeses are bound to attend; the reason suggested to us for granting this *mandamus* is, that if the lord should hold his leet in any other place than where it has usually been holden, the in-burgeses are not bound, or will not attend it; but this reason doth not appear satisfactory to me, and there is no precedent of a *mandamus* of this kind.

Chapple Justice: If the in-burgeses have attended this leet at the town-hall time out of mind, as is alledged, that custom is a *right*.

But the rule for a *mandamus* was denied by *Wright* and *Dennison* Justices, *contra Chapple*, (*absente Capital Justic'*) there never having been a precedent of such a rule.

In an ejectment on the demise of the Mayor, Aldermen and Commonalty of Bristol, *versus* — B. R.

MR. *Henley* moved to change the *venue* from *Bristol* to the next adjacent county. *Cur'*, Take a rule to try it in the next county, the way is not to change the *venue*, but to try it in the next county. Rule to try a cause in the next county.

Rex versus Roberts. B. R.

UPON the traverse of an inquisition sent out of Chancery to be tried in B. R. the *venire facias* must be made returnable upon a general return, and not upon a day certain. Ve. fa. on a traverse of an inquisition must be returnable at a general return.

Drew versus Marriot. B. R.

THIS was a rule to shew cause why the process served upon the defendant should not be discharged, the same being sued in *Middlesex*, and the defendant being served with it in *London*: upon shewing cause an affidavit of the plaintiff was read, wherein he swore that the defendant promised him to appear to any writ he should sue out, and it being a doubt whether the place where the defendant was served was within the county of *Middlesex* or the city, the court thought it a good service, and discharged the rule. Service of process, and it is doubtful whether the place where defendant was served is in London or Middlesex.

Symonds *versus* Parmenter and Barrow. B. R.

Amendment
of the title of
a declaration
according to
the truth of
the fact as to
the time of
the delivery
thereof.

IN an *assumpsit* by original returnable in *Trinity* term 16 & 17 Geo. 2. *Barrow* being abroad the plaintiff was obliged to proceed to the outlawry against him, (this being a joint action) before he could go on against *Parmenter*; he accordingly did outlaw *Barrow*, and afterwards on the 11th day of *February* in the last *Hilary* term delivered a declaration to *Garnett* the defendant's attorney, intituled of *Trinity* term in the 16 & 17 Geo. 2. when the writ was returnable, in which declaration the record of the outlawry against *Barrow* was set forth, (as was necessary) which outlawry was pronounced and recorded long after *Trin.* 16 & 17 Geo. so that the title of the declaration was absurd; therefore it was now moved by Mr. *Bancks*, on behalf of the plaintiff, for leave to alter the title of the declaration according to the truth of the fact as to the time of the delivery thereof, which was on the 11th of *February* last, and to make it a declaration of the octave of the Purification of the blessed virgin *Mary* in that term, which was after the outlawry: Sir *John Strange* for the defendant objected, that a proper foundation to amend by had not been laid before the court, as might be done by filing a bill of *Hilary* term to warrant it by, and as was done in *Russell versus Martin*, *Pas.* 10 Geo. 1. But *per curiam*, the affidavit of the fact that the declaration was delivered the 11th of *February* last, is a sufficient ground for us to make the title of it agreeable to the truth, and there is a difference between mending a declaration in the body of it, and in altering the title of it, and the rule for mending the title was made absolute.

Malachi Carolino's Case. B. R.

Ambassador.
Protection.

HE was interpreter to the ambassador to the court of *Great Britain* from the *Bey* of *Tripoli*, and being arrested upon the process of this court for a debt, a rule was made for the parties concerned in the suit against him to shew cause why he should not be discharged out of custody upon the *stat.* 7 *Annæ*, which rule was founded upon *Carolino's* own affidavit; wherein he swore that in *May* 1744. he was retained by the ambassador to be his interpreter, and to transact his business in the cities of *London* and *Westminster* for the wages of 30 *l.* *per annum*, and that he was not a trader, or liable to a commission of bankruptcy; and upon several other affidavits made by other persons that he was not a trader, and upon the certificate of the ambassador himself that he was his interpreter.

Trinity Term 17 & 18 Geo. 2. 1744. 79

Mr. *Lloyd* and Mr. *Hume Campbell*, in shewing cause insisted he was not such a servant as is within the meaning of the *stat.* of Q. *Ann.* viz. a domestic servant; and notwithstanding Mr. Attorney General and Sir *John Strange totis viribus* pressed to have the rule made absolute, yet the court was clear of opinion that there was not sufficient matter laid before them to make the rule absolute, for it does not appear that *Carolino* is a domestic servant; and *Wright* Justice with some warmth said, it did not appear he had done any one act as a domestic servant, and that it was formerly thought necessary that a foreign ambassador's servant must lie in the house to entitle him to a protection under the statute; so the rule was discharged. *Vide Evans v. Higgs, Paschæ 1 Geo. 2. B. R. Toms and Hammond C. B. 7 Geo. 2. Ward and Purcell, Mich. 2 Geo. 2. Moor* secretary to the *Russian* ambassador's case. *Ward and Percy. Ball and Fitzgerald. Ld. Raym. 1524.*

N. Lee Ch. Justice was confined at home by the gout from the first *Tuesday* in term, till the end of it.

Michaelmas Term

18 Geo. 2. 1744.

Howell qui tam *versus* Morris. B. R.

THIS was an action upon the *stat. 18 Eliz. cap. 15.* against the defendant for making and selling gold rings of less fineness than the statute directs, whereby the value of the rings so sold were forfeited, one half to the King, and the other to the party grieved; and now Mr. *Harvey* moved for leave to compound, and cited a case of *Bell qui tam v. Wyatt, Trin. 1733.* where there was no consent, and yet the court in that case gave leave to compound. *Per curiam,* It is in the discretion of the court to give leave to compound, and they desired Mr. *Harvey* to look a little further into the case he had cited, and afterwards the court denied to give leave to compound.

Leave to compound denied upon the statute for selling gold rings of less fineness than the statute directs.

Coates

Coates *versus* Hewit. B. R.

Debt upon a bond with condition to pay money at three times, the bond is in force by making any one default.

THIS was an action of debt upon a bond with condition for the payment of 5*l.* on the 1st of *August* 1742. and 5*l.* more on the 1st of *August* 1743. and 5*l.* more on the 1st of *August* 1744. The action was commenced and the bill filed in *Easter* term last, which was before the day of the last installment; the defendant set forth the condition, and demurred; and upon arguing this case by Serjeant *Bootle* for the defendant, and serjeant *Draper* for the plaintiff, the single question was, whether this bond was forfeited, and the action could well be brought before the day of the last installment was passed; and *per tot' curiam*, the bond became absolute by not performing the first, or any one of the payments in the condition, notwithstanding that the condition doth not say, "that in default of payment at any of the said times the bond shall be in force;" and they said there was a difference between debt on such a deed as this, and an action on a contract for paying several sums at several times. See *Co. Lit.* 222. *b.* *Mo.* 65. 10 *Rep.* 128. *Co. Lit.* 292. *Owen* 42. Judgment for the plaintiff.

N. The same point exactly was determined between *Hallet* and *Hodges* afterwards in *Easter* term 25 *Geo.* 2. wherein there was judgment for the plaintiff. B. R.

Skinner *versus* Stacey. B. R.

Principal and interest, &c. upon a mortgage referred to the master on stat. 4 & 5 Ann.

THE defendant being a prisoner, moved that upon paying the principal, interest and costs, to be computed and taxed by the Master, all proceedings in this action upon a bond for performance of covenants in a deed of mortgage; and in an ejectment brought upon the same mortgage might be stayed upon the *St.* 4 & 5 *Anna*, and that the defendant might be discharged out of custody: Mr. *Ford* for the plaintiff objected, that the defendant had agreed to convey to the plaintiff the equity of redemption; but it appearing upon an affidavit read that the plaintiff had not tendred to the defendant a deed of conveyance to be executed, and that no bill in equity was brought, the court granted the motion, after time taken to consider thereof.

Benjamin

Benjamin *versus* Howell. B. R.

TRESPASS, laid at *Hereford* in the county of *Hereford*, for taking the plaintiff's cattel, and driving them away, and converting them to his use; defendant pleads Not guilty as to the conversion; and as to the taking and driving them away, justifies as bailiff of the manor of *A.* that such proceedings were had in the court of the manor, that a *distringas* issued directed to the defendant, who by virtue thereof distrained the plaintiff's said cattle to enforce his appearance at the manor court, and concludes *quæ est eadem transgressio*, without traversing the place laid in the declaration; and after two arguments by *Ford* and *Evans* for the plaintiff, and *Poole* and serjeant *Bootle* for the defendant, upon a special demurrer the court gave judgment for the plaintiff, that the plea without a traverse was not an answer to the trespass at *Hereford*; and *Lee* Chief Justice cited *Cro. El.* 705. which says a traverse is necessary, and thought the plea bad in substance; *Wright* Justice was of the same opinion; but *Dennison* Justice, doubted whether it was bad in substance, but was clear it was bad in form; and *that* being shewn for cause, judgment must be for the plaintiff, which was given accordingly.

Traverse is necessary where defendant justifies at another place than is laid in the declaration. Cited for the plaintiff *Cro. El.* 504. *Co. Lit.* 288. 2 *Lut.* 1407. 3 *Lev.* 113. 227. *Carth.* 323. 2 *Mod.* 86. For the defendant *T. Jones* 146. *Cro. Car.* 228. *Salk.* 641. *Lut.* 1862. 1 *R. Rep.* 227. 327. *Curtis v. Adams.* Vide 1 *Stra.* 694. cited by *J. Dennison.*

Between the Parishes of *Fittleworth* and *Pulborough* in *Suffex.* B. R.

WILLIAM *Overington* with his wife and three children came with a certificate from *Pulborough* to *Fittleworth*, and after continuing in the parish of *F.* some time, *William O.* at a court-leet held for the bishop of *Winchester* for the manor of *Amberley* (within which part of the said parish of *F.* lies) was elected and sworn tithingman for *Cold Waltham*; that after having continued in that office five months, he became chargeable to, and received relief of the said parish of *F.* whereupon he was removed to the parish of *Pulborough* by an order of two justices; *Pulborough* appealed to the sessions, who state this matter specially, and being of opinion that *W. O.* gained a settlement at *Fittleworth*, quashed the order of the two justices.

A certificate person comes from one parish to another, and is chosen tithingman, but, before he has served the office a year, becomes chargeable, he is removable.

And now it was moved by Sir *John Strange* and Mr. *Burrell* to quash the order of sessions, and to confirm the order of the two justices, they insisting that the pauper had gained no settlement at *F.* 1st, Because the manor where he was chosen and sworn tithingman, did not extend through the whole parish; 2^{dly}, Because he did not serve the office a whole year, and was actually removed before the

Y

year

year was expired; and of that last opinion was the whole court, so quashed the order of sessions, and confirmed that of the two justices. *Lee Ch.* Justice said, that as soon as the *pauper* became chargeable, the two justices had jurisdiction to remove him, but laid no stress upon the manor or office not extending through the whole parish; but they all held, that he must serve the office for a whole year, or could not thereby gain a settlement.

N. Mr. Justice *Chapple* was absent all this term by reason of sickness.

Anonymous. In Chancery.

If the plaintiff in Chancery reply to a plea in bar, he admits it to be good in law. **I**T is a rule in the court of Chancery, that if the defendant pleads in bar, the plaintiff must either set down the plea to be argued if he think it not good in law; or, if he think it good, he must reply to it and put the facts of the plea in issue; and when the plaintiff has replied, he thereby has admitted the plea to be good in point of law.

Hilary Term

18 Geo. 2. 1744.

Ante. Lord Inchiquin *versus* Lord O'Brien. In Canc. coram Lord Hardwicke 7 Feb.

Where the personal estate shall be first applied to the payment of debts, though the real estate be charged therewith. **L**ORD *Thomond* by his will (*inter al'*) devised in this manner: "As to my worldly estate both real and personal, I dispose thereof as follows; first, I will that all my debts which I shall owe at the time of my death shall be paid." Lord Chancellor said, if the will had gone no farther this would have been sufficient to have charged his real estate with his debts, in case his personal estate had fallen short: Then he goes on in his will and devises his real estate to trustees, upon trust that they shall sell such a competent part thereof (for the most money that could

could be got) as shall be sufficient for payment of his debts and legacies; "And my further will is, that the money to be raised by sale of my real estate shall be deemed as personal;" and then he gives all the rest and residue of his personal estate to Lord O'Brien after payment of his debts and legacies.

It was proved in this cause by plaintiff, that Lord Thomond's personal estate at the time of making his will was about 8000 *l.* and it was proved by the defendant that it was about 15000 *l.* but at the time of Lord Thomond's death it was about 33000 *l.* and his debts about 50000 *l.* his real estate 8000 or 9000 *l.* *per ann.*

The question in this cause was, whether the personal estate (*viz.* that part which was properly so, his chattels) should go to Lord O'Brien, discharged of the testator's debts and legacies.

Lord Chancellor: This question depends upon the rules adhered to in a court of equity and the precedents there, and upon the meaning of this will, and of the application of those rules to it. By law as well as equity the personal estate is the first and proper fund for payment of debts, and in this court as well as the spiritual court, is the only fund for payment of legacies. If the personal estate be exempted from the payment of debts or legacies, it must be done either by express words, or by a plain intention arising from the whole tenor of the will; and if it is exempted, it must appear that it is given away by a specific bequest; and this must be taken along with it, that there is another fund raised for payment of the debts: and when a man by his will charges his real estate with payment of his debts, &c. or directs it to be sold for that purpose, there is no difference, for there are many cases that prove this, and yet if the personal estate be not expressly exempted, or implicitly, *viz.* by devising it specifically, it shall be first applied in exoneration of the real estate; and to direct a real estate to be sold out and out, is very different from the present case, for it is only said here, that a competent part thereof shall be sold, and there is no case wherever it was pretended that the personal estate was exempted where the rest and residue was given in this manner, *viz.* "After payment of my debts and legacies;" and the meaning of the testator must have been, that in case his personal estate should fall short, then that a competent part of his real estate should be sold; but to take off the force of this it is insisted that by these words in the will, "And my further will is, that the whole money to be raised by sale of my real estate shall be deemed as personal", the testator meant that so much of his real estate should be sold as should be equal to his proper personal estate, and should be added to the same, and that out of *that* aggregate fund, the debts, &c. should be paid, and after payment out of *that* aggregate fund, the residue should go to the residuary

fiduary legatee; but I see no foundation for this construction, for it was never heard of, that because a residue of a personal estate was given, that, at all events some residue must pass by the will; for no man can tell at the time of making his will how his personal estate may be increased or diminished, or how long he may live; so he decreed the personal estate first chargeable with the testator's debts and legacies. *Vide Walter v. Bigg, or Pink, 31 July 1736. Chester and Painter, 2 Wms. Bampffield and Windbam, Prec. in Eq. Wainwright and Benlow, 2 Vern. Prec. in Canc. 451. Barkham and Bethlem Hospital, Stapleton and Colevill. Bromball and Wilbraham. Hasslewood and Child, August 30, 1734.*

Ormichund *versus* Barker. In Chancery.

An infidel pagan idolater may be a witness.

IT was held by the Lord Chancellor, assisted by Lord Chief Justice *Lee*, the Master of the Rolls, the Lord Chief Baron and Justice *Burnett*, that an infidel, pagan, idolater may be a witness, and that his deposition sworn according to the custom and manner of the country where he lives, may be read in evidence; so that at this day it seems to be settled, that infidelity of any kind doth not go to the competency of a witness; in the debate of this point, *Ryder* the Attorney General cited the covenant between *Jacob* and *Laban*, *Genesis, cap. 31. v. 52, 53.* where *Jacob* swore by the God of *Abraham*, and *Laban* swore by the God of *Nabor*. *Vide Psalm 115, 106. v. 36.*

Easter Term

18 Geo. 2. 1745.

SIR *William Chapple* Knight, one of the Judges of the King's Bench, died in the last vacation, and upon the first day of this term Sir *Michael Foster* Knight, serjeant at law, was sworn one of the Judges of the same court in his stead, and upon the same day *Edward Clive*, Esq; a learned barrister, was called to the degree of serjeant at law, and sworn one of the barons of the court of Exchequer in the place of Sir *Lawrence Carter*, who also died in the last vacation; but baron *Clive* was in so bad a state of health that he was not able to take his place this term. The motto of his ring was *Non vis exiget otium. Hor. lib. 4. od. ult.*

Bradburn versus Taylor. B. R.

THIS was error upon a judgment in the Common Pleas, and the error assigned was, that the defendant (as it appeared by a *certiorari* to the clerk of the warrants of the Common Pleas and his return thereof) had assailed his warrant to defend by *William Round* his attorney, and that it appeared by the judgment which was transcribed that the defendant appeared and defended by *George Long* his attorney; but *per curiam*, this error assigned is contrary to the record, therefore the judgment must be affirmed. *Vide 1 Strange 684. Ld. Raym. 1414.*

Error contrary to the record may not be assigned.

Honour versus Wetherhead or Whitehead. B. R.

THIS was a rule to shew cause why the defendant should not be discharged out of the county gaol of *Surry* upon common bail, he having been discharged as an insolvent fugitive by the justices of peace for that county, upon the *stat. 14 & 15 Geo. 2.* upon this case. The defendant was born in *England*, and when he was very young was carried over in his mother's arms to *Boston* in *New England*; he grew up to be a merchant abroad, and traded to *Great Britain*, and was himself in *New England* when he contracted

Insolvent debtor.

Z

all

all the debts he owes, and (among others) being indebted to the plaintiff in a large sum of money, came over to *England*, and rendered himself to prison according to the statute, in order to take the benefit thereof, which the justices have granted him, as thinking him an object within the fugitive act, since which he has been arrested for the plaintiff's debt.

And now Sir *John Strange* shewed cause why the defendant should not be discharged upon common bail; and 1st, He insisted the defendant was not within the statute, his debts having been contracted abroad; 2^{dly}, That the act directed that fugitives should render themselves to the gaol of that county wherein they resided for the last six months before they fled; and cited a case (wherein he himself was concerned) of *Cann v. Boyd*, Mich. 13 Geo. 2. *Boyd* was born in *Ireland*, was put apprentice to a merchant in *Holland*, and served his time, then set up for himself, failed, and fled to *Ireland*, stayed there until the insolvent act, then came over to *England* and rendered himself, and obtained his discharge thereupon at the quarter-sessions; being afterwards arrested for a debt which he contracted with his plaintiff a merchant in *England*, obtained the like rule to shew cause, as in the case at bar; and it was strongly insisted that he was a debtor here, that he was in foreign parts, that he came over on purpose to take the benefit of the act, that the intent thereof was to invite persons hither who were afraid of a gaol: but the court thought him not within the description of the preamble, so not within the statute, and discharged the rule. And in the case at bar the court took time to consider.

Symonds *versus* Parmenter and Barrow. B. R.

Side bar rule obtained without disclosing the whole circumstances of the case shall not be suffered to stand.

THIS was an action upon a bill of exchange against the two defendants jointly by original writ; the defendant *Parmenter* only appeared, so that the plaintiff was under the necessity of proceeding to the outlawry against *Barrow* before he could declare against *Parmenter* alone; accordingly *Barrow* was outlawed, which outlawry the plaintiff shewed in his declaration; to this, *Parmenter* pleaded there was no such record of outlawry; the plaintiff replied *quod habetur tale recordum*. The plaintiff's attorney discovering that there was a mistake in the record of outlawry, applied to the proper officer to amend the same, agreeable to the *exigent* and proceedings that had been upon the outlawry, who told him he would take care to set it right; accordingly the officer (filacer) applied to the court at the side bar, and obtained of course a rule to amend the record of outlawry by the proceedings which had been thereupon, but without acquainting the court at the same time that *Parmenter* had pleaded *Nul. tiel record*. And now upon shewing cause why this side bar rule

rule should not be set aside, the court said they would not suffer a side bar rule to stand which had been obtained in this unfair manner, in not acquainting them with the whole circumstance of the matter, and that they would not let the amendment be made without hearing *Parmenter*, who was greatly affected thereby; for if the record of the outlawry was not agreeable to the declaration, *Parmenter* at present had a very good defence in pleading *Nul tiel record*; so the side bar rule was discharged *per totam curiam*. But afterwards at another day this term, the court, upon hearing counsel on both sides, ordered the amendment to be made in the entry of the outlawry agreeable to the process, and the officer to pay defendant his costs, and the defendant to have liberty to plead *de novo*.

Between the Parishes of Sheephead in Leicestershire
and Milburn in Derbyshire. B. R.

THOMAS *Membury* a certificate-man came from the parish of *Sheephead* to the parish of *Milburn*, by a certificate dated November 1733. was a schoolmaster, and taught the charity-school there until his death in 1743. but in what manner he was admitted to this school it does not appear, but only in general that he officiated till his death. That lady *Ann Hastings* had by deed conveyed to trustees ten pounds *per ann.* in trust to be paid to the vicar of *Milburn* for the time being for the charity-school; that this 10 *l.* *per ann.* had not been appropriated to any other use than paying it to the schoolmaster; and whether *Thomas Membury* had gained a settlement at *Milburn*, either as serving an office, or as having a freehold in the school of 10 *l.* a year, was the question; and the sessions were of opinion, and declared he gained a settlement there, as having had a freehold in the school.

2 Stra. 1225.
S. C.
Schoolmaster
who is a certificate man
gains no settlement.

But *per curiam*, (*absente Foster J.*) a schoolmaster is not an office, but only an employment; and what interest *Thomas Membury* had in the school, whether for life, or how otherwise, or how he was admitted to, or came into this employment, does not appear; and that the vicar is the person intitled to the 10 *l.* *per ann.* and not choosing to teach the school himself paid it to this poor man as his deputy, which could not gain a settlement for any person whatever; so the order was quashed. Mr. *Gundry*, Mr. *Ford* and Mr. *Willmot* of counsel for *Sheephead*; Sir *John Strange* and *Floyd* for *Milburn*.

Martindale *versus* Fisher. B. R.

Averment.
Promise for
promise is a
good confi-
deration in an
action on an
assumpsit,
without an
averment of
the perform-
ance of the
promise of
plaintiff.

THIS is a special action upon the case, wherein the plaintiff sets forth in his declaration that an horse-race was agreed to be run between an horse of the plaintiff and one of Sir *Marmaduke Wyvill's*, and that in consideration that the plaintiff had agreed to deliver to the defendant three yards and one eighth of cloth, the defendant agreed to pay to the plaintiff 5*l.* 12*s.* 6*d.* in case Sir *Marmaduke Wyvill's* horse should beat the plaintiff's horse, but if the plaintiff's horse beat Sir *M. W.'s* then defendant to pay nothing for the cloth; and avers, that Sir *M. W.'s* horse won the race; upon the general issue there was a verdict for the plaintiff. It was now moved in arrest of judgment, and the exception taken to the declaration by serjeant *Boote* was, that it is not averred in the declaration that the cloth was delivered to the defendant; but to this it was answered by Mr. *Ford*, and resolved by the court, that this was an action founded on mutual promises, and that here was only promise for promise, and therefore it was not necessary for the plaintiff to make an averment in his declaration of the delivery of the cloth; and the court said the case of *Nichols and Raynbred*, *Hob.* 88. is in point. *Dennison J.* said, that where a plaintiff declares that in consideration he the said plaintiff would deliver to the defendant a piece of cloth to the defendant, that the defendant should pay such a sum of money for it, in that case an averment of the delivery of the cloth is necessary; but if plaintiff states an agreement, and then lays it that in consideration of such a promise or agreement, &c. there is no need of an averment. So *N. B.* the difference. And the *Postea* was ordered to be delivered to the plaintiff. *Vide Hob.* 106. *Yelv.* 136. 1 *Lev.* 293. *Hard.* 103.

Vavafor & al' Executors *versus* Faux. In Error. B. R.

Several judgments against three executors defendants, two of whom only join in bringing error, is bad.

THIS was an action of debt brought in the court below by *Faux* against *Vavafor* and two other persons executors; one of the defendants pleaded *Plene administravit* generally, upon which *Faux* took judgment against him *de assets in futuro quando acciderint*; the other two defendants pleaded judgments & *plene administraverunt ultra*; *Faux* replied that the judgments were obtained *per fraudem*, and upon the trial had a verdict, whereupon those two defendants brought a writ of error; some trifling objections not worth setting down were taken to the declaration, and the court said, the only question here was, whether this writ of error was properly brought by the two defendants below, without joining the other defendant, against whom there is judgment *de assets in futuro*; and if

if there be any material exception to the declaration, the judgments must be reversed *in toto*; and they were of opinion at present that all the three defendants below ought to have joined in bringing the writ of error, and that they not all joining, is an objection that cannot be got over. *Uterius concilium.*

And afterwards this point was spoken to again June 24, 1745. when the writ of error was quashed without costs. *Vide 2 Stra.* 977.

Noke and Chiswell *versus* Ingham. In Error. B. R.

IN an action upon several promises brought in the Common Pleas by Ingham against Noke and Chiswell jointly as partners; Noke pleaded a judgment recovered in C. B. by Ingham against them both upon the same promises; Ingham replied *nul tiel record*, and upon issue thereon judgment was given against Noke, and a writ of inquiry of damages awarded; and final judgment; Chiswell the other defendant pleaded that he was a bankrupt, and that the cause of action arose before he was a bankrupt; and upon this issue is joined, whereupon the plaintiff Ingham below entered a *nolle prosequi*, viz. that he will not proceed any further as to the issue joined between him and Chiswell.

In an assumpsit against two persons who sever in pleading, a *nolle prosequi* may be entered as to one, and it shall not destroy the action as to the other. Bankrupt.

And now upon a writ of error brought, Mr. Ford for the plaintiffs in error objected, 1st, That this being an action against two persons upon a joint contract, and the plaintiff below having entered a *nolle prosequi* as to one of them, hath thereby discharged them both; 2^{dly}, He objected that the entry of the *nolle prosequi* being by attorney was erroneous, for it ought to have been by Ingham in person.

And in support of the first objection was cited *Boulter v. Ford*, 1 Sid. 76. which was covenant against two, who covenanted to build a house in a workmanlike manner; one pleaded performance, and upon trial it was found for him, the other suffered judgment to go by default; and it was held by the court, that the verdict having found the covenant performed, discharged them both, and that both defendants should have their costs. *Blake's case*, 1 Sid. 378. was also cited to shew that in all cases where an action is brought upon a joint contract against several defendants, and one of them is discharged by nonsuit of the plaintiff, they shall thereby be all discharged. And to support the second objection, *Cro. Jac.* 211. 8 Rep. 58. *Co. Lit.* 138. b.

Serjeant Draper for the defendant in error, 1st, By the statute of 10 Annæ, c. 15. the discharge of a debt as to one partner becoming

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Cro. Car. 239.
243.
2 Hawk. P.
C. 196.

ing a bankrupt shall not discharge the other partner. 2dly, There is a great difference between a *nolle prosequi* and a *retraxit*, the first being only in nature of a nonsuit, and is no bar to a future action for the same cause, but the latter is a bar to a future action, and so a compleat discharge thereof; for it is considered as a departure in despite of the court, and is used to shew that the plaintiff ceases to prosecute his whole suit for ever; but a *nolle prosequi* may be as to part; and the action may be brought against both partners, though one pretends to be a bankrupt, for the plaintiff may falsify the certificate of the bankrupt. Stat. 5 Geo. 2. for if the plaintiff be obliged to proceed against one only, he will lie under great difficulties, because he must then set forth that the other is a bankrupt, which is a matter out of his knowledge. As to the objection to the manner of entering the *nolle prosequi*, precedents are in various ways, some that the party came (not saying either in person or by attorney) others, that he came by his attorney. 1 Saund. 202, 205, 339, 342. Co. Ent. 172. b. there it is by attorney, Raft. Ent. 654. b.

Difference
between a
nolle prosequi
and a *retraxit*.

Lee Ch. Justice: It is agreed on all hands, that in trespasses against several, the plaintiff may enter a *nolle prosequi* as to one, and that will not discharge the other, and therefore I cannot see why it may not be done in this case; and I do not see how so proper an advantage can be taken upon the Stat. Annæ (as to the bankrupt) as is now taken by the entry of this *nolle prosequi*; a *retraxit* is a total relinquishment of the suit, and has a very different operation from a *nolle prosequi*; I am of opinion that the judgment ought to be affirmed: Wright J. of the same opinion; Dennison J. of the same opinion; and further said, that the plea of the bankrupt is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration; but that is not the case here; this case is exactly the same as where an action is joint and several, for the Stat. 10 Annæ, c. 15. has made the partner (not a bankrupt) liable for the whole debt; and I never saw a declaration where upon a joint contract it was suggested that one of the defendants was a bankrupt; and it might be doubtful at the time of bringing the action whether the person was a bankrupt or not; and I think this the most proper way of declaring, and the most proper form of entry; and this case is the very same, (as to this matter of entering a *nolle prosequi*,) as if it had been trespass against several defendants. The judgment was affirmed.

Coleby *versus* Norris. May 14, 1745. B. R.

A Copy of *mesne* process was served upon the defendant, which upon the backside thereof was dated at a day to come (20 May 1745.) and even after the return of it, the process itself was so likewise; *Lawson* moved to set aside the writ; but *per curiam*, (*absente* Lee C. J.) the indorsement of the date on the back of the writ is no part of the writ, the *teste* being right is sufficient, and he took nothing by his motion.

The date of a writ is no part of it, if the *teste* be right it is well enough.

Serjeant *versus* Read. B. R.

THIS is an action of trespass against the defendant, who is servant to the corporation of *Pensance*, for taking and carrying away three bushels of barley; the defendant pleads that one *Richard Daniel* was seised in fee of the manor of *Pensance*, in which there was a quay or pier which was parcel of the said manor, and that he and all those whose estate he had, at their own costs and charges for time out of mind, had repaired and ought to repair the said quay or pier, and had of right taken a reasonable duty called bushelage, to wit, three *Winchester* bushels of barley out of and for every ship's cargo of barley brought upon the said quay to be exported in any ship; and that he the said *Richard Daniel*, by indenture of bargain and sale, for the considerations in the said indenture mentioned, conveyed the said quay or pier to the corporation of *Pensance*, to hold to them and their successors in fee farm for ever; and that by virtue of the said bargain and sale, and of the statute of uses, the said corporation became seised in their demesne as of fee, then he shews in his plea that the plaintiff brought upon the said quay, a ship's cargo of barley containing 1200 *Winchester* bushels to be exported; and that he, as servant to the corporation, and by their command, took out of the same ship the three bushels of barley in the declaration mentioned, as it was lawful for him to do by virtue of the said prescription; the plaintiff replies that the defendant took the barley of his own wrong, and traverses the prescription; and thereupon issue is joined, and a verdict is found for the defendant in favour of the prescription.

2 Stra. 1228. S. C. Prescription for three bushels of barley out of every ship's cargo brought to a quay to be exported is good.

And now it was moved in arrest of judgment on the behalf of the plaintiff by Serjeant *Belfield*, Mr. *Banks*, and Mr. *Gould*, and two exceptions were taken.

1st, To the prescription: That notwithstanding the jury have found for the defendant, yet that the prescription is void in law,

as being both uncertain and unreasonable, as to take a certain quantity out of an uncertain one, no body being able to say how much was a *ship's cargo*; and it may be a small or a large cargo, and three bushels out of each such different cargoes can never be a reasonable proportion; also that the prescription is not properly pleaded, because it is without exemption to any persons whatever, and that it is well known, tenants in ancient demesne might be exempted, and so are the precedents with respect to tolls; also that it was unreasonable in this, that a man might bring corn in order to be exported, and yet not export but carry it back again, in such case to take three bushels would be unreasonable.

To this it was answered by Sir *John Strange*, Mr. *Gundry*, Serjeant *Draper* and Mr. *Henley* for the defendant, and resolved by *Lee Ch.* Justice and the whole court, that the word *cargo* is a mercantile term, and very well understood when referred to a ship, and is sufficiently certain; and this case is very much like the case of stallage, the party bringing his corn to the quay having an easement, the owner of the quay a damage; so in *Lutw.* 1519. There was a prescription for so much money for setting up a stall in a fair, and for ground near the stall; and it was objected this was uncertain how much ground; but it was held a good prescription, for the quantity of ground near a stall is to be determined by the usage of the fair; and the case in *T. Raym.* 233. is not like the present case, for the objection of Lord *Hale* was there, that it did not appear what quantity of salt was in the ship, and perhaps there might not be above two bushels, but in the case at bar, the quantity of barley appears; and as to the manner of pleading this prescription without excepting any persons, if it had been pleaded otherwise it would have been wrong, for this is a general prescription.

The 2d exception was to the title made to the corporation, that the indenture of bargain and sale made by *Richard Daniel* to the corporation, is only said to be for the considerations therein mentioned, whereas it ought to have been pleaded to have been in consideration of money, or for a valuable consideration, and that nothing can pass by bargain and sale without a pecuniary satisfaction. 1 *Lev.* 170. 1 *Rep. Mildmay.* 3 *Lev.* 233. *Mo.* 569.

To this it was answered and resolved by the court, that 3 *Lev.* 233. was the only case cited like to this, and which the Chief Justice said he did not well understand; that the cases mentioned were upon demurrer, but this is after a verdict; and it is further pleaded in this plea, that by virtue of the indenture, which was made so long ago as 1614. the corporation entered and were seised, and therefore the court will intend there was a good and valuable consideration,

tion, especially as the plaintiff has not thought proper either to craveoyer of the bargain and sale, (of which there is a *profert in curiam*) or to demur to it, which he ought to have done if he had thought it insufficiently pleaded, and if it be not so well pleaded as it might have been, he is now too late after a verdict to take advantage of it, it might have had another consideration upon demurrer. Judgment for the defendant.

Rex *versus* Bull. B. R.

MR. Lloyd moved for an information upon the *stat. H. 5. c. 4.* Information against Bull for practising as an attorney when he was under-sheriff, but it was refused because the affidavit upon which he moved, only swore that he practised as an attorney, without mentioning what particular acts he did as such, that the court might judge whether such acts were practising as an attorney. Lee Ch. Justice said an information was granted against one Husk, undersheriff of Huntingdonshire for the like offence.

Information for practising as an attorney while he was under-sheriff.

Trinity Term

18 & 19 Geo. 2. 1745.

Walker *versus* Robinson. B. R.

2 Stra. 1232. S. C.

TRESPASS for assaulting the plaintiff, stopping his waggon, and taking away a cart-rope; the defendant by way of justification pleads that *Doncaster*, the place in which, &c. is a borough by prescription, and that the corporation have a right to toll of all goods passing through the town, in consideration of repairing the streets thereof; that the plaintiff was passing through the town with his waggon loaden with goods, and the defendant, as collector of the toll, demanded of him two pence; that the plaintiff refusing to pay it, he took the cart-rope as a distress; the plaintiff by his replication says, that the defendant did

Costs. No more costs than damages when the judge certifies on the stat. 43 Eliz. c. 6.

B b

not

not demand the two pence before he distrained the cart-rope, and thereupon issue is joined, and a verdict is for the plaintiff, and one shilling and six pence damages. This cause was tried before Mr. Justice *Burnett*, who certified upon the *stat. 43 Eliz. c. 6.* upon the *postea* in these words, "I do hereby certify that the damages to be recovered in this action do not amount to forty shillings, but to one shilling and six pence, and no more."

Bootle serjeant came up last term, and moved for full costs; and now *Poole* for the defendant in shewing cause, insisted that the plaintiff was intitled to no more costs than damages in this case, which is expressly within the *stat. 43 Eliz. c. 6.* "That in any action personal brought in the courts at *Westminster* not being for any title to lands, nor for a battery, if it appear to the Judge who tries the cause, and be set down by him that the damages shall not amount to 40 shillings, or above, the court shall not award costs to the plaintiff any greater or more than the sum recovered shall amount to, but less, at the discretion of the court." It was insisted by the Serjeant, that there being an *assportavit* laid in the declaration, increase of costs had always in such case been given by the court; to which it was answered, that all those cases were upon the construction of the 22 & 23 *Car. 2. cap. 9.* that where there is an *assportavit*, the Judge cannot certify upon that statute, but such case is within the *stat. of Glouc.* it does not therefore follow but that an *assportavit* may be within this *stat. 43 Eliz.*

It was also insisted for the plaintiff, that in cases of special pleading, if a verdict be for the plaintiff, the court has always awarded an increase of costs; to which it was answered that there can be no legal foundation for full costs, unless the right of freehold comes in question, or in a *son assault* where the battery is confessed, for it would be doing contrary to the express enacting clause of the *stat. 43 Eliz.* And the case of *Butler and Reeves*, *Gilb. Rep. 195.* was upon the *stat. Car. 2.* In the case of *White v. Smith* in *C. B. Paschæ 1744.* for taking and carrying away sand, there was a verdict for the plaintiff, and less than 40 shillings damages; and *Willes Ch.* Justice certified they were the proper damages upon this *stat. 43 Eliz.* And the court would not allow more costs than damages.

Bootle Serjeant replied, that the statute of 43 *Eliz.* as to this matter has never been put in ure (before the late case in *C. B.* mentioned,) and that is a virtual repeal of it according to *Co. Lit. 81.* and he said that the *stat. 22 & 23 Car. 2.* was a repeal of *stat. 43 Eliz. pro tanto.*

Lee Ch. Justice: Although I do not remember that the *stat. 43 Eliz. c. 6.* was ever put in ure, yet it is a subsisting statute, and if

if this case be within it, we must judge accordingly, for I do not know that this court has any power to disallow acts of parliament; this is merely a personal action, where no freehold was in question, neither was there any battery, but only an assault, and as the Judge who tried the cause has certified that 1 s. 6d. are the damages, I think there is nothing to take it out of the *stat. 43 Eliz.*

Wright Justice, ad idem.

Dennison Justice: This is a new case; I have heard it said that this *stat. of 43 Eliz. c. 6.* had been explained away, but imagin that arose from its never having been put in ure. This *stat. of Eliz.* was intended to explain the *stat. of Glouc.* which was evaded by laying the damages in the declaration above 40 shillings, and was to enforce the true meaning of the statute of *Glouc.* and therefore enacted, that if the Judge would certify that the damages given were the proper damages, and which the jury ought to give and no more, so that it might appear that the action ought properly to have been brought in an inferiour court, then the superior court was to allow no more costs than damages. I confess I think there are many actions, and that this is one of them, where neither the freehold may come in question, nor any battery confessed or proved, very proper to be brought in a superior court, though the damages may not amount to 6d. for the *quantum* of damages here are not so much the matter in controversy, as the prescription and right to the toll. The *stat. of Eliz.* and that of 22 Car. 2. are very different, the *first* by certificate deprives the plaintiff of full costs, the *other* by certificate intitles him to full costs; but notwithstanding I think this a proper action to be brought here, yet as the Judge has certified, I cannot see how this court can adjudge directly contrary to an act of parliament. The action of battery was possibly put into the *stat. 43 Eliz.* because it might be then thought that such action would not lie in the county court, and to be sure it will not with *vi et armis*, but I do not know but it will lie without *vi & armis.* *Foster J. ad idem.* And the rule to shew cause why the plaintiff should not have full costs was discharged *per totam curiam.*

Between

Between the Parish of Petroch in Devonshire and
Stoke Fleming. B. R.

A poor parish
girl bound to
serve till 21,
(without say-
ing or till
marriage) and
assigned over
to another,
gains a settle-
ment where
she last served.

ANNE Giles was removed by order of two justices from *Petroch* to *Stoke Fleming*; upon an appeal, the sessions state specially, that *Ann Giles* was bound by indenture as a poor parish child, with consent of two justices, to *Rebecca Gregory* of the parish of *Petroch*, to serve from 1733. the date thereof till her age of 21 (not said or marriage, as directed by the *stat. 43 Eliz.*) that she served *Rebecca Gregory* under that indenture five years till *July 17, 1738.* when *Rebecca Gregory* agreed with *Philip Fowle* of *Stoke Fleming*, to assign over to him her apprentice; accordingly *Rebecca Gregory* delivered up to *Philip Fowle* the indenture, and by an indorsement thereupon assigned to him all her interest therein; that upon the same day *Ann Giles* being then 14 years old, bound herself by another indenture to *Philip Fowle* to learn houswifry, and to do such other business for him as he should have to do, and served him from that time till 1744. in the parish of *Stoke Fleming*; that the day before the order of two justices was made, the sessions vacated the indenture of apprenticeship, whereby the pauper was first bound to *Rebecca Gregory*, (but the court said they could take no notice of *that*, because it did not appear that this vacating the first indenture had any influence upon the two justices in making their order.)

Mr. *Gundry* moved to quash the order of the two justices; 1st, Because the first indenture was not made according to the 43 *Eliz.* which says that poor girls shall be bound to serve till 21 or marriage, and it is till 21 absolutely, which is void. 2^{dly}, That an infant has no power to bind herself, so the second indenture is void; or if the first indenture should be thought by the court to be well enough, yet there can be no legal assignment thereof, so service under one or other of these will gain no settlement.

To this it was answered by Mr. *Stracey*, and adjudged by the court, that the first indenture is well enough and only voidable, and it is stated there was an indorsement whereby *Rebecca Gregory* assigned all her interest and term to come in the apprenticeship, and the girl binding herself to *Philip Fowle*, is only her consent to go to serve him. To be sure strictly speaking, an apprentice cannot be assigned over by law, except in *London* by the custom. In the case of *St. Nicholas* and *St. Peter's Ipswich*, where a boy was bound under the 43 *Eliz.* for four years and served them, the court held he gained a settlement; so the order of the two justices was confirmed, the pauper having gained a settlement at *Stoke Fleming*, where she last served.

Rex *versus* Gilbert. B. R.

DEFENDANT was brought up by a *habeas corpus*, upon the return whereof it appeared that he was committed upon the *stat. 9 Geo. 2.* for being taken with fire arms in company with several other persons feloniously assembled, aiding and assisting in the clandestine running of goods; Mr. *Smythe* moved that he might be admitted to bail, as being pardoned by the *stat. 18 Geo. 2.* But *per curiam*, This offence is not pardoned by the statute, and the defendant, if he thinks proper, may upon his trial plead the statute, but as at present advised, we think this crime is not pardoned by the 18 Geo. 2. so the prisoner was remanded.

Simmonds *versus* Parmenter & al'. B. R.

CASE upon a joint bill of exchange, one defendant is outlawed, and the plaintiff declares against the other setting forth the outlawry; the defendant craves *oyer* of the original writ and record of outlawry thereupon, and then pleads *nul tiel record*, without inserting the *oyer* which he had craved and had; the plaintiff replies *quod habetur tale recordum*, and after the paper-book was made up, it was moved by Serjeant *Wynne* and others on the behalf of the plaintiff, that the defendant might be obliged to insert the *oyer* (which he had craved) in the paper-book. But *per curiam*, Such a motion was never known, and if the plaintiff has a mind to set forth the *oyer* or record of outlawry, he may do it in his replication; for the party who has had *oyer* may do as he pleases, whether he will set it forth in his plea or not; so the plaintiff then moved for leave to amend his replication, by inserting the record of the outlawry, which was granted upon payment of costs.

Cited 2 *Lutw.* 1695. and 2 *Barnes* 266. *Weavers Co. v. Ware*, 1 *Barnes*, *Spinks v. Bird*, 66.

N. When *oyer* of a bond is demanded, the defendant when he comes to plead, seldom sets forth the whole bond, but only the obligation or condition, or so much thereof as makes for his purpose.

Cooke *versus* Berry. B. R.

New trial
never granted
for want of
evidence
which might
have been
produced at
the trial.

ASSUMPSIT upon a promissory note; defendant pleaded that the plaintiff accepted of some chests of tea in satisfaction, upon which issue was joined, and there was a verdict for the defendant; it was now moved on behalf of the plaintiff by Sir *John Strange* and Mr. *Crowle* for a new trial, upon an affidavit that the plaintiff took this to be a sham plea, and that he had a letter under the defendant's own hand, wherein it appears the defendant had disposed of the tea to another person, and wherein the defendant says he will pay the plaintiff his money due upon the note, which letter the plaintiff did not produce at the trial, thinking the plea was a sham, and that the defendant could not possibly prove it.

In a sci. fa. on
a judgment
the defendant
has a release
and omits to
plead it, he
shall not have
an audita
querela.

But *per curiam*, New trials are never granted upon the motion of a party where it appears he might have produced and given material evidence at the trial if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes if once a door was opened to this. Suppose in a *scire facias* upon a judgment, the defendant has a release, he is summoned, and has an opportunity of pleading it, and does not, he shall never have an *audita querela*; this is a very strong case at bar, for the plaintiff has notice of the defence of the defendant in his plea, and ought to have come prepared to falsify it at the trial. And *Dennison J.* said he remembered a case of a horse plea, where the defendant pleaded he gave the plaintiff a horse in satisfaction; plaintiff looked upon it as a horse (or sham) plea indeed, but the defendant at the trial proved it a true plea. Rule to shew cause why there should not be a new trial was discharged.

2 Salk. 653.
2 Mod. 22,
222.

Barlow *versus* Evans. B. R.

Scire facias
against bail in
error of a
judgment for
damages in
the C. B. must
be to shew
cause why the
plaintiff should
not have exe-
cution of the
debt aforesaid
and not da-
mages.

SCIRE *facias* against bail upon a writ of error of a judgment in the Common Pleas for certain damages, setting forth that *A.* recovered against *B.* certain damages, and that the defendant bound himself in a recognizance in 193 *l.* to be levied upon his lands and chattels, in case the plaintiff in error did not prosecute his writ of error with effect; then the *scire facias* commands the sheriff to give notice to the defendant (the bail) to shew cause why the plaintiff should not have execution of the damages aforesaid, according to the form of the recognizance aforesaid; the defendant demurs, and shews for special cause that the word *damages* aforesaid is wrong, and that it ought to be *debt* aforesaid; the plaintiff joins in demurrer.

Ford

Ford for the defendant, insisted that a *scire facias* is a new action, and in the nature of a declaration. 1 *Inst.* 290. *b.* And that if an action had been brought upon the recognizance it must have been debt; and here the demand is not of damages and costs in the original action, but of the specific sum of 193 *l.* entered into by the recognizance, and so prayed judgment that the *scire facias* might be quashed.

Luke Robinson for the plaintiff, insisted it is well enough, for the *scire facias* is for the defendant to shew cause why the plaintiff should not have execution of the damages aforesaid, according to the form of the recognizance aforesaid, and the word *damages* may be considered only surplusage.

But *per curiam*, This is upon a special demurrer, and the particular defect in the writ is pointed out, which the plaintiff might have amended; it ought to have been to shew cause why the plaintiff should not have execution of the said debt of 193 *l.* according to the form of the recognizance aforesaid, and no case has been cited to shew that wherever a defect has been pointed out by a demurrer, that the court have considered such fault a surplusage, and they said they thought it was not surplusage. Judgment that the writ be quashed.

Douglas *versus* Hall. B. R. In Error.

TRESPASS, assault and battery in the C. B. Not guilty, verdict and judgment there for the plaintiff below. Error is brought, and upon the common errors assigned, it is objected for the plaintiff in error that there are two counts in the declaration, and both of them are by way of recital with a *quod cum*, &c. which is error, and cited by Mr. *Stracey*, 2 *Lev.* 206. 2 *Bull.* 206. 2 *Sho.* 2 *Salk.* 636. 27, 295, 447. and *Norman v. George*, Hil. 4 Geo. 2. which was trespass, assault and battery in C. B. and error after a verdict for the plaintiff below, and was the very same point as now at the bar, and he said he was informed the judgment was reversed.

Draper Serjeant on the other side, admitted all the old cases to be as cited, but insisted that of late it had been otherwise resolved, and that the count might be made good by the writ which is set out in the declaration, and is affirmative; and to shew that counts in trespass are helped by the writ-part of the declaration cited 1 *Sid.* 187. and *Franklyn v. Reeve* B. R. Mich. term 9 Geo. 2. error of a judgment from the C. B. in trespass, where after the setting out the writ in the declaration the plaintiff counted for taking and carrying away divers loads of dung and soil, without saying of his the said plaintiff's,

plaintiff's, and the court held it was made good by the writ-part of the declaration.

Lee Ch. Justice: The case of *Norman* and *George* was the very same as this, but what judgment was given I cannot say, or whether any: But as at present advised I think this declaration is well enough, it sets forth the writ, that the defendant was attached to answer the plaintiff of a plea of trespass, wherefore with force and arms, &c. and then the declaration upon that writ is *quod cum*, &c. the writ and count may be considered as one, and I think the *quare vi & armis* in the beginning is a sufficient averment. 1 *Sid.* 150, 187. 1 *Lutw.* 1509. *Cro. Eliz.* 185, 198. to shew that the writ and count are one: upon the whole, I think the *quod cum* is helped by the *quare vi & armis*, &c. I do not indeed remember any case in this court by bill where this fault has been helped.

Wright Justice inclined to the same opinion, and said that by the note he had of *Norman* and *George*, no judgment was ever given in it.

Dennison Justice: I am glad the court is inclined to get over this objection; I heard the case of *Norman* and *George* spoken to, and the difficulty with the court was, that where any thing is objected as a variance between the count and the writ upon a writ of error, they thought they could not take notice of it without the writ was brought hither; this stuck with them at that time. Where the writ is set out in the declaration in *C. B.* it shall be taken to be as set out, 2 *Vent.* 153. 2 *Lutw.* 1180. The present case in short is this, that the defendant was attached to answer why he assaulted the plaintiff, then he counts upon the writ with a *quod cum*, &c. I think we may reject the *quod cum* as surplusage, and why should we not do it as well as where a man's name is mistaken; it may be called a variance, but I think it is a very immaterial one after the merits are tried. Perhaps it might have been bad if the defendant had demurred to it, but I am much inclined to think it well enough upon a writ of error after a verdict.

To be spoken to again.

But I suppose it was never spoken to again, the plaintiff in error seeing the court incline against him.

Ouston versus Hebden. B. R. In Prohibition.

RULE to shew cause why a prohibition should not go to the court of Admiralty; the defendant *Hebden* being a part owner of the ship *Scarbrô*, procured a warrant from the Admiralty and arrested her in port.

Prohibition.
Where there
are several
part-owners
of a ship, the
owners of the
less shares
may arrest the
ship in the
Admiralty,
and compel a
security to be
given by the
others before
they shall be
permitted to
navigate out
of port.

The suggestion for a prohibition sets forth the proceedings in the Admiralty, states the libel, which is, that this ship was built at *Scarbrô*, that the builder sold one third part of her in sixteen parts, retaining the other two thirds of her to himself, that the whole ship is worth about 500*l.* that the builder mortgaged his two thirds, and died, and that his widow and representative sold the same absolutely to *Ouston*, who is now the master as well as owner of two thirds; that this sale to *Ouston* was made without the consent of the other part-owners, and without any security given to them by *Ouston*; that he being master and chief part-owner, insisted upon going a voyage against the will of the other part-owners; that he refused to pay them for their shares, (they desiring not to continue any longer part-owners with him) or to sell the ship and distribute the money among them in proportion; and then the libel concludes praying the ship may be sold, or that they may have such other remedy as may be thought proper by the Admiralty.

Ouston in his answer to the libel says, that *Hebden's* share is not worth more than 50*l.* that the other parts are worth 450*l.* that the other part-owners agreed to his (*Ouston's*) purchase, and did not insist upon his giving security before the institution of the suit in the Admiralty; and then he says, that there is no such usage as set forth in the libel for the court of Admiralty to sell the ship, and says that he insisted the ship should go the voyage, and it is suggested for a prohibition that the Admiral has no jurisdiction in port.

Doctor *Straban* against a prohibition: The suit in the Admiralty is instituted against the ship and not the person, and it is clear the Admiral has jurisdiction in this case from many authorities; from the laws of *Oleron* made in that island by *Richard* 1. when he came from the holy land, *Prynn.* 121. and he cited *stat. 4 Ann. c. 16.* as to seaman's wages; and several orders of council, viz. of 14 December 1644. and in March 1665. and an agreement between all the Judges of England and the Judge of the Admiralty of 18 February 1632. which was confirmed by the King in council, and ordered to be registred among their orders, a copy whereof is in *Prynn.*

D d

Serjeant

Serjeant *Bootle* of the same side: The defendant being a part-owner is in the nature of a tenant in common, and there is no remedy for one tenant in common against another at common law for disposing of the whole ship, and so is 1 *Lev.* 29. *Lit. sec.* 323. *T. Raym.* 15. And where there is no remedy at law, this court will not grant a prohibition to the Admiralty. *Vide* 1 *Roll. Abr.* 530. *C. pl.* 3. 1 *Ld. Raym.* 223. *Fitzgib.* 192.

Poole of the same side: This is not a common law question touching property, for the respective shares of the owners are admitted upon the face of the pleadings, but the question is concerning the exercise of property, and as this is a matter for which no remedy can be had at common law, this court will not grant a prohibition; courts of law can issue no process to prohibit waste, and do not take cognizance thereof until after it is done. To shew this suit is properly instituted, *Skin.* 230. And there is no want of jurisdiction, nor of a proper trial in the Admiralty, and the suit there is *in rem* and not *in personam*.

Sir *Thomas Bootle* for a prohibition: This whole transaction appears to be at *Scarbrô*, from whence the *pais* may come, and it is universally laid down in our books, that the Admiralty has no jurisdiction of matters done at land, whether here, or beyond sea, and if a contract be agreed upon at sea, and sealed and finished at land, it is the same as if the whole had been made at land; they pray to have the ship sold, the most that can be done is only to oblige *Ouf-ton* to give security.

Lee Ch. Justice: Are you willing to give security?

Sir *T. Bootle*: We must take it as it appears upon the libel, which contains more than the Admiralty has jurisdiction of, *viz.* it prays a sale of the ship; the cases cited by the Doctor only shew that the Admiralty has jurisdiction concerning the laying of ships in port, and injuries done to one another in port by laying too near, &c. seaman's wages, &c. but even in cases of wages, if they are not in the common way, but by special contract at land, the Admiralty has no jurisdiction. As to the orders of council, this court never did, nor ever will take notice of them, they are of no authority at all to a court or a jury, and I hope never will reach the jurisdiction of this court; and as to the agreement between the Judges and the Admiralty, *that* is of no authority at all. It is objected that a part-owner has no remedy at law against another, in answer, *Carth.* 26. Lord *Holt* was clear of opinion that one part-owner may have a special action against another for hindring him to go out with the ship. *Vide* 1 *Ld. Raym.* 223.

Mr.

Mr. *A. Fawkes* of the same side: The original jurisdiction of the Admiralty is either by the connivance or permission of the common law courts; the *stat. of Ric. 2. and H. 4.* are only in affirmance of the common law, and to prevent the great power the Admiralty had got by the laws of *Oleron*; and the true reason for their jurisdiction in matters done at sea, is because no jury can come from thence, for if the matter arise in any place from whence the *pais* can come, the common law will not suffer the subject to be drawn *ad aliud examen*; and this is the true touchstone to try whether the Admiralty has jurisdiction. 12 *Rep.* 129. *Roll. Abr.* 531. *Owen* 122. *Brownl.* 37. 2 *Ro. Rep.* 413. It appears *Hebden*, at *Scarbrô*, before a notary public protested against *Ouston*, or any other person's navigating the ship out of the port of *Scarbrô*, by the 4th article of the libel; from whence the *pais* may come; and in cases between man and man the Admiralty has no jurisdiction. *Cro. Ja.* . . *More*, 891. 2 *Rep.* 49. *Mo.* 916.

Whether the court of Admiralty can compel security to be given in this case has been *vexata questio*, and that they cannot, see *Hard.* 473. *Carth.* 26. 6 *Mod.* 162. Though the Admiralty has no jurisdiction, yet a remedy may be had in the Hall; for in the case of *Cobb* and *Masters* in Chancery, before Mr. Justice *Parker*, who sat for the Chancellor, it was decreed that the greater part-owners should not navigate the ship until security given to the others; Mr. *Hume* and Mr. *Lawson* were both of counsel in that cause; but suppose the Admiralty has a jurisdiction to compel a security, yet there is no such thing prayed in the libel, which is only to sell the ship; and I humbly insist there is no court whatever can compel any man to part with his property against his will.

Lee Chief Justice: Generally speaking, the court of Admiralty has no jurisdiction of matters or contracts done or made at land; but this particular case must be determined upon the whole case as it appears upon the pleadings; now the libel concludes with praying that the ship may be sold, &c. Or that the party libelling may have such other remedy as that court shall think proper; I have no doubt but the Admiralty has a power in this case to compel a security, for this is a proceeding *in rem* and not *in personam*; and this jurisdiction has been allowed to that court for the public good, as is confirmed by the case cited from *Fitzgib.* where it is said that courts of law have allowed it. Indeed the Admiralty has no jurisdiction to compel a sale, and if they should do that, you might have a prohibition after sentence, or we may grant a prohibition against selling or compelling the party to sell, or to buy the shares of the others, which was agreed to, *per totam curiam*, and the rule as to that was made absolute; but as to compelling a security to be given the rule was discharged.

Johnson

Johnfon *versus* Bridgwater. B. R.

A small mistake in the title of the declaration not a reason to set aside the judgment, and the roll may be right.

THE bill of *Middlesex* was returnable on *Friday* next after the morrow of the holy *Trinity*; the plaintiff's attorney delivered a declaration to the defendant's attorney, intituled of *Trinity* term in the 19th year of King *Geo. 2.* which the defendant's attorney at the same time told him was wrong, and ought to be *Trinity* term in the 18th and 19th years of the King, (for the effoin-day was in the 18th year, and all the rest of the term in the 19th) and desired him to make it right, which he refused to do, and proceeded to judgment for want of a plea; and now *Ford* moved to set aside the judgment, insisting that there was no such term as *Trinity* term in the 19th year, and said the like thing happened about the 7th year of the present King; and Lord *Hardwicke* said it ought to be stiled *Trinity* term in the 7th and 8th years of the King. The court agreed it was *Trinity* term the 17th and 18th years of the King, and said if the roll was right it would be well enough; and the Master in court saying that many declarations of this term were intituled in the 19th year, they thought it was too much to set aside the judgment for this small mistake, because it might affect many other cases, and be of great public inconvenience to many plaintiffs; and discharged the rule to shew cause.

Behema *versus* James. B. R.

Copy of process served without the defendant's name to the notice at the bottom is bad.

A Copy of a *latitat* was served upon the defendant without his name to the notice at the bottom of the copy; and it was moved by Mr. *Hussey* to quash the *latitat*, which was done *per tot' cur'*; and they said it had been often so ruled, and that the *stat. 5 Geo. 2.* expressly requires it; *Fawcet* for the plaintiff opposed it strongly.

Smith *versus* Davies. B. R.

A freeholder is refused a rule to inspect the rolls of the manor in a case between himself and the lord touching a copyhold.

THE lord of the manor of *Tootham* in *Suffex* brings this ejectment for lands claiming them as copyhold; the defendant is a freeholder in the manor, and claims the lands in question as freehold; and the defendant moved for a rule to inspect the court rolls of the manor; but it was refused *per curiam*, and they said such a rule was never heard of; the plaintiff is not obliged to assist the defendant to make out his title; and *Lee* Chief Justice said that churchwardens, in a case lately, were refused to inspect parish books, where they themselves were parties.

Michaelmas Term

I Geo. 2. 1745.

Gulliver *versus* Wickett. B. R.

THIS was an ejectment, upon the trial whereof this case was made for the opinion of the court.

Robert Waith being seised of lands in fee, by his will of the 8th of December 1686. devised the whole to his wife *Katharine* for her life, and after her death to such child as she was then supposed to be enseint with, and to the heirs of such child for ever, provided that if such child as shall happen to be born shall die before the age of twenty-one years leaving no issue of its body, the reversion of one third of the said lands should go to his wife and her heirs; one third to his sister *Elizabeth* and her heirs, and the other third to his sister *Ann* and her heirs.

Devise to a child in ventre sa mere, where the child never was in existence. And what are words of condition and what of limitation, and what is a good executory devise.

The testator died soon afterwards, leaving his wife who was not with child, nor ever had one, and three sisters, *Elizabeth*, *Ann* and *Mary* his heirs at law, to the last of whom he only gave a legacy of five pounds; the lessor of the plaintiff claims under the wife and two sisters *Elizabeth* and *Ann*, and the defendant claims under the other sister *Mary*.

The principal question for the consideration of the court is, whether the devise over to *Katharine*, *Elizabeth* and *Ann* be a good devise or not; for if it is good, then judgment must be for the plaintiff, if not good, then one third descended to *Mary*, and it will be for the defendant.

This case was solemnly argued by Mr. *Commyns* for the plaintiff, and Serjeant *Skinner* for the defendant, *Hil.* 17 Geo. 2. and by Mr. *Ford* for the plaintiff, and *Bootle* for the defendant, *Trin.* 18 & 19 Geo. 2. and in this term, *Lee* Chief Justice delivered the opinion of the whole court for the plaintiff.

E c

Lee

Lee Chief Justice: The intention of the testator upon the face of this will is very plain and clear, and therefore it ought to be fulfilled if by law it can; the devise to *Katharine* for life, with remainder to such child as my wife is *enseint* with in fee, we are of opinion is a good contingent remainder to a supposed child *in ventre sa mere*; and if there had been no devise to the wife for life, the devise to the child *in ventre sa mere*, being *in futuro*, would have been a good executory devise; but as in the present case the devise to the child *in ventre sa mere*, is after a freehold to the wife, it is certainly a good contingent remainder. *Salk.* 229. *Cro. Jac.* 590. 2 *Saunders* 388. *Bridgman* 3. The devise being to the child and its heirs, if the will had stopped there it would have been an absolute fee, but the proviso which follows has contracted it, and made it a fee-simple conditional.

1 *Vent.* 202.
Salk. 570.

But it is objected that the proviso is a condition precedent, and that the birth of a child is a condition precedent, but we are of opinion that the devise to the child is a limitation of a remainder. 1 *Vern.* 304. *Pollex.* 72. 3 *Keb.* 122. 2 *Lev.* 21. 1 *Vent.* 229. *Page* and *Hayward*, *Trin.* 4 *Annæ*; and by *Holt* Ch. Justice, the word condition is to be considered as a limitation, whereby it appears that it may be considered as a limitation either where the devise is in tail or in fee.

Then it is further objected, that though it is now settled that a devise to a child *in ventre sa mere* may be good *ab initio*, and take effect when such child comes into life, yet where it appears afterwards that no such child ever was in *rerum natura*, the devise becomes void *ex post facto*; but in answer to this it must be observed that no case has been cited to support this, nor is there any reason for this difference, for we are of opinion that whether the limitation to the child never took effect, or whether it did, and was determined, is the same thing, as appears by the cases cited 1 *Leon.* 197. 2 *Leon.* as the remainder to the child never could take place, the next devise over must take effect, *Dyer* 300. 2 *Vern.* 723. for taking the proviso to be a limitation, and not a condition precedent, these cases amount to a full answer; and therefore we are all of opinion,

That the true construction of this will is, that here is a good devise to the wife for life, with remainder to the child in contingency in fee with a devise over, * which we hold a good executory devise, as it is to commence within 21 years after a life in being; and if the contingency of a child never happen, then the last * remainder to take effect upon the death of the wife, and the number of contingencies

* N. The Ch. Justice sometimes called this devise over executory, and sometimes he

called it a remainder (in delivering the opinion of the court,) so that it seems to me uncertain whether they determined it an executory devise or a contingent remainder.

gencies

gencies are not material, if they are all to happen within a life in being, or a reasonable time afterwards. Judgment for the plaintiff.

Andrews v. Fulbam, Trin. 11 Geo. 2. B. R. The same question was determined with regard to leasehold lands to be a good remainder in thirds; and in *Hil. 1742. in C. B.* three judges in court; the same case between *Roe and Wickett*, held, that the devise over was a remainder depending upon a contingency which never happened, and therefore never could take effect; cited *per* Serjeant *Skinner arguendo*; *contra* the present determination.

The Mayor, &c. of Northampton *versus* Ward. B. R.

THIS is trespass for breaking and entering the plaintiff's close, ^{2 Stra. 1238.} called the *Butcher-row* in the town of *Northampton*, and ^{S. C.} erecting a stall there for a certain space of time; the defendant by ^{Whoever} leave of the court pleaded three several pleas; 1st, The general issue ^{will have a} to the whole; 2^{dly}, As to breaking and entering the said close, ^{stall in a} erecting a stall there, and permitting it to remain for the space of ^{market must} twenty hours; he pleads that the said place where the trespass is ^{first have a} supposed to be done, is as well called by the name of *A.* as by ^{licence for} *Butcher-row*, and lies within the town of *Northampton*, which is a ^{that purpose} burrough by prescription, and that time out of mind there has been ^{from the own-} a public market there for buying and selling, &c. And says there has ^{er of the soil,} been a custom time out of mind for every butcher, being a freeman ^{otherwise} of the town, to erect a stall in the said place to expose his flesh to ^{trespass lies.} sale without paying for the same, and avers that he is a freeman and a butcher, and justifies entering the said place, (being on a *Saturday*, which was the market day) and erecting a stall for exposing his flesh to sale, as it was lawful for him to do, which he says is the same trespass mentioned in the declaration. 3^{dly}, He pleads that as to placing the stall there, and permitting it to remain 20 hours, that the town of *Northampton* is an antient town, and that the *locus in quo* is within the said town; that there is a public market holden every *Saturday* in the *locus in quo* for selling of butcher's meat, that he therefore entered the same place where the market was kept with his meat, to sell the same, and erected a stall for exposing his meat to sale in the said open market, and laid his meat upon the stall for selling it, which stall he says was necessary for him for the exposing his meat to sale, as it was lawful for him to do, which is the same trespass, &c.

As to the 2d plea the plaintiff replies with a *protestando*, and traverses the custom.

As

As to the 3d plea, the plaintiff replies with a like *protestando*, admits *Northampton* is an antient town, that the *locus in quo* is within it, and that a market is held there on every *Saturday*, and says that the corporation is seised in fee of the said close in which, &c. and of the said market, and that the defendant, without the licence or consent of the plaintiff, and of his own wrong, entred and erected the stall.

Defendant rejoins to the replication to the 2d plea, and takes issue upon the traverse of the custom.

And to the replication to the 3d plea there was a frivolous rejoinder, and thereupon a demurrer by the plaintiff, who shewed for special cause that it does not appear that the defendant had any legal right to set up a stall in the market, nor had any leave so to do from the plaintiff, who is seised both of the soil and market.

So that there were two issues joined to the country, viz. upon the Not guilty, and the custom, which went down to be tried, and a verdict was found for the plaintiff against the custom, and also for the plaintiff upon the Not guilty.

But as by law the defendant with leave may plead as many pleas as he thinks fit, and if any of them be a good legal defence for him he must succeed against the plaintiff, or if none of the pleas be good, yet if plaintiff has mistaken his action, he cannot have judgment against the defendant; therefore the defendant by his third plea having insisted that he had not only a right to come into the market, but also to set up a stall there, it being a public market, the plaintiff's replication was not a good answer to it, as he insists, and therefore the demurrer was argued three times at the bar, viz. In *Mich.* term 18 Geo. 2. by *Luke Robinson* for the plaintiff, and Serjeant *Draper* for the defendant; In *Hilary* term 18 Geo. 2. by Mr. *Starkey*, Postman of the Exchequer for the plaintiff, and *Willes* the King's Serjeant for the defendant, and in *Trinity* term last by Sir *John Strange* for the plaintiff, and Mr. *Gundry* for the defendant. I heard and noted all the three arguments, the substance of all of them being contained in the last, I shall only set that down here.

Sir *John Strange* for the plaintiff: There are two principal questions arise in this case.

1. Whether of common right every person in *England* may come into a public market and erect a stall there.

2. If he cannot do it, (which I shall endeavour to shew he cannot) whether an action of trespass is not the proper action in this case for the plaintiffs as owners of the soil?

Stallage and *piccage* are so well known in the law that they want no definition; but if it be of common-right to erect a stall in a market, there is an end of them both; the common right that has ever been contended for, as to a *market*, has never been carried further than the coming into the *market* to expose goods to sale; if any one so coming will have a *stall*, he must pay for it, which is *stallage*, and if he breaks the *soil* it is *piccage*. The right to a *market*, and right to the *soil*, are very different things, and *one* may belong to one man, and the *other* to another, and *stallage* and *piccage* are incident to the *soil*; therefore if the King grant a *fair* or *market* with *toll* certain, to one and his heirs to be held within land that is *borough english*, and the grantee dies, the heir at the common law shall have the *fair* or *market*, and the *toll*; but the youngest son shall have the *piccage* and *stallage* with the *soil*, by the custom. *Mo.* 474.

Piccage and *stallage* are very different from *toll*, for *toll* is certain, is payable by the buyer, and not unless there is a sale, and must be by grant or prescription; but *piccage* and *stallage* are uncertain, payable whether the goods on the stall be sold or not, and are due of common right to the owner of the *soil*, even where a new market is held or kept; and therefore as I insist the *soil* is no further appropriated to the use of the public, when a market is held thereon, than for liberty to any man to enter the market to buy and sell there, any person who wants an easement, (as a *stall* is,) must agree with the owner of the *soil* for licence to erect *one*, and if he erects one without such leave, he is a trespasser. 2 Inst. 220.

It appears upon this record that the plaintiffs are the owners of the *soil*, that the defendant erected a *stall* thereon without their licence, for it must be taken he had no licence, he not having pleaded any; but however, it is averred in the replication that the defendant did it of his own wrong.

If a man cannot fix a *stall* in a *market* of common right, it follows he must make some composition with the owner of the *soil* before he can do it; for if a man uses my *soil* without my leave, I may maintain *trespass* against him; and an action of *debt* will not lie, for here is no certain duty or recompence, nor can the plaintiff distrain, because there is no certain demand; case on an *assumpsit*, or *quantum meruit* will not lie, because there is not any *contract*, and these must be grounded upon a promise, either *expressed*, or such as the law will *imply*; and as this was done without the plaintiff's licence,

Blount's Law
Dict. Min-
shew, Boyer
verbo Estal-
lage.
Spelm. Gloss.

and of the defendant's own wrong, which is confessed by the defendant, there could be no *contract*; *stallage* is a satisfaction to the owner of the *soil* in a *market*, for the liberty of placing a *stall* upon it, the plaintiff is the owner of the *soil* here, and so has a right to such satisfaction, and there is no right without a remedy; if, therefore, neither *debt*, *assumpsit*, nor *quantum meruit* will lie in the present case, nor the plaintiff can distrain, (as I have already shewn,) *trespass* must be the only remedy.

I shall now take notice of what was said of the other side upon the former argument. It was said, 1st, That as the law gives the defendant leave to come into the market to sell his goods, it will also give him every thing necessary for the conveniency of selling and exposing them to sale, and that it appears upon this record that a *stall* was necessary for the defendant in the *market*.

In answer to *this*, it must be admitted, that every person may come and bring with him to the *market* his goods to sell, but if he wants any conveniencies *there*, as a *stall* of less or greater dimensions, he must agree with the owner of the *soil* for it, for if it were otherwise, there would be nothing but strife and confusion, instead of peace in the *market*, and the strongest hand would engross the largest *stall*, and a few persons might take up the greatest part of the space in the *market*, and the owner of the *soil* have no adequate satisfaction; and as to a *stall* being absolutely necessary for a butcher, he may have his meat carried about the *market* in baskets, which would be as convenient to the public as if he had a stall, which can only be for his own single conveniency or easement.

The case of the six carpenters, 8 *Rep.* was cited for the defendant, but is an authority for the plaintiff, for it proves that where one enters the freehold of another under a licence or legal authority, and afterwards abuses that licence or authority, he thereby becomes a trespasser *ab initio*; where a man has a right of *common*, and the *soil* happens to be so overflowed that he cannot enjoy it without digging trenches to drain it, yet if he does dig trenches to drain it, the owner of the *soil* may bring *trespass*. 1 *Sid.* 251.

Another objection was, that *it*: being a public *market*, the *soil* was dedicated to the public use; in answer to *this*, I admit that no man can be a trespasser for coming into the market, the *soil* being dedicated for that particular purpose of a *market*; but if a man breaks the *soil* (as has been admitted on the former argument by Serjeant *Willes*) he becomes a trespasser, and so he is (as I insist) if he erects a stall without the licence of the owner of the *soil*. In the case of *Sir John Lade v. Shepherd*, Hil. 8 Geo. 2. In an action of trespass *quare clausum fregit*, upon Not guilty a case was made for

for the opinion of the court, which stated, that the *locus in quo*, &c. was formerly the property of the plaintiff, that he, some years ago, built houses and a street upon it, and that part of the said place near the houses had, ever since, been used as an highway; that the defendant was owner of the lands joining to this highway, which was only parted by a ditch; that the defendant laid a plank over this ditch by way of bridge, one end whereof rested upon his own ground, and the other upon the plaintiff's, *which* was now an highway; upon the argument of this case it was very strongly insisted, that the plaintiff having made this an highway, the *soil* was dedicated to the *public*, and he could not now maintain *trespass* for thus laying the end of a plank upon it, (but whether the defendant might be liable to an indictment for it, was another matter); Lord *Hardwicke* and the *whole court* were of opinion, and said, "That although it was certainly a dedication of the *soil* to the use of the *public*, so far as the *public* might have occasion to pass and repass along this street or highway, yet that the plaintiff had not absolutely parted with the property of the *soil*, and to all other purposes, except the right of passage to the *public*, it is still the plaintiff's *soil*, and this was an *easement* to the defendant, and if he will have it he must agree with the plaintiff for it;" and *per totam curiam*, "Trespass well lies, and judgment was given for the plaintiff". This is the case of the owner of the soil; but in 2 *Rol. Abr.* 549. *H. p.* 1. he that has only the herbage of a forest or close may have trespass, as well as he who hath the land. Every man must keep himself within his own privileges, for if a man bring his cattle upon the common with an intent to agree for them there, and having driven them thither, finds the common not yet fit, he becomes thereby a trespasser notwithstanding he drives the cattle away again immediately, and although he might lawfully go himself to see if the common was fitting. 1 *Rol. Abr.* 406. *pl.* 7.

It was also objected, that if the defendant cannot set up a *stall*, it will be putting it in the plaintiff's power to deprive him of the benefit of the *market*, which every man in *England* has a right to come into, to sell his goods, and *this* would be a public inconvenience. In answer to *this* I would mention the case of coal-mines in the north, where if the owner of the mines wants to have a way over his neighbour's grounds (though coal mines be for the public benefit) yet he must agree for it with *him* over whose ground he would pass, though it be never so poor and barren; the owners of coal-mines have often made attempts, (some in parliament,) to break through these *way-leaves*, but they never could prevail; for it is but reasonable, if my neighbour happens to find coals close by my lands, which makes his estate of twenty times the value it was before, if he will have a way over my ground, which is of infinite benefit to him, that I should have some recompence; for though my

my ground may not be worth 2*d.* *per ann.* before to myself, yet to my neighbour, it may be worth 100*l.* *per ann.* and if he will come over it without my licence, my only remedy is *trespass*.

Du Fresne's definition of a stall was mentioned before by Serjeant *Willes*, that it was a station or place, &c. and that though a man might come to a *market*, yet if he could not have a *station* or place to put his wares upon, he might as well not have the liberty of coming into it all; to this, I admit he may have a *station*, with a *basket*, or such a thing, but if he will have a *stall*, and take up a greater space of ground, he must pay the owner of the *soil* for it. It was also objected, that the plaintiff ought to have made a demand of a sum of the defendant for *stallage*, before he could maintain *trespass* in this particular case; in answer, I submit that it might as well be said that in every case of a *trespass* a satisfaction must be demanded while the party is doing the *trespass*; so he concluded for the plaintiff.

Argument for
the defendant.

Mr. *Gundry* for the defendant: The defendant has averred that a *stall* was necessary for him for exposing his goods to sale, and this, by the demurrer, is confessed; it is admitted I have a right to come into the *market* and bring my goods in order to sell them, and by the pleadings that a *stall* is necessary; but it is said, no man is obliged to find or provide me a *stall*, therefore I insist I have a right to erect a *stall* myself. I shall endeavour to answer Sir *John*, and shew,

1st, That *stallage* is not due of common right; and

2^{dly}, That *trespass* in this case is not the proper remedy.

In order to the 1st, I shall give some account of the origin of fairs, and of the nature of *toll*, *piccage* and *stallage*.

Fairs and *markets* are derived from the crown, and must be by grant or prescription; the *public* have an interest therein, and that is the reason why no man can have *either*, without licence from the King; and it is no uncommon thing in the law, for a person to have a franchise, and yet be only considered as a mere trustee for the *public*; as in the case of a corporation, the grant to the *mayor* may be for the benefit of the whole town; *markets* were originally granted to towns for the *public good*, therefore the *public good* is chiefly to be considered. In former times the greatest part of the property of this kingdom was in a few great men, lords of manors, cities and antient towns, and it was for the lord's benefit for people to resort to his manor, to take off and buy the produce of his lands; and for the benefit of towns, to have people come to their markets, to supply them with such necessaries as they daily wanted.

I cannot find one judicial determination in all the books, that stallage is due of common right; that it may be due by grant or prescription, I admit; but there is a great difference between what may be due, and what is necessarily due; it would be more reasonable to say that toll is due of common right (which no body can say it is) than that stallage is, for he that has toll is obliged to keep books, and to do other things; in 1 *Lutw.* 1518. stallage is considered as a kind of toll; and as to the case in *Moor*, of the two brothers, where the market goes to the eldest, and the soil (being *borough english*) to the youngest, it does not follow from *that*, that stallage is due of common right. If it be payable at all, it must be by custom; see Dr. Kennett's *paroch. antiq. Glossar. verb. Stallagium*, that stallage is a *customary* rent paid in fairs and markets for the liberty of a stall or standing; and though it may sometimes be incident to a market, or fair, yet it is separable; and *Hen. 2.* granted to the tenants and merchants within the honour of *Wallingford*, *ut quieti sint de Tbelonio, Stallagio, &c.* As to the 2d point, that the defendant is not a trespasser.

2 Inst. 220.
2 Ro. Abr.
123.

Supposing (for argument's sake only) that stallage be due as necessarily incident to the owner of the soil where a market is kept, it must be a certain duty, and not arbitrary, therefore debt will lie for it, or the owner may distrain; and let the right to some duty be but fixed; it must be recoverable upon a *quantum meruit*, which of late years hath been substituted in the place of that action which was formerly called a special action of debt, as it is called in the case of the six carpenters, 8 *Rep.* 147. for the law to say there is something due to the lord, and that there is no way to recover it, is a mere *jus vagum*; trespass is to recover damages for a tort, if any sum of money be due, *this* cannot be the proper action.

It is admitted that every man has a right to come into a market with his goods to sell, and defendant has pleaded that a stall is necessary, which by the demurrer is also admitted, therefore it follows that every man has a right to erect a stall, if this were not true, it would be in the power of the owner of the soil, let the market be in whom you will (and it may be in another person, as in the case in *Moor*) to defeat the owner of the market of his profits thereof, by demanding such unreasonable sums for stallage, as would prevent every body from coming to market who had any large quantity of goods to sell, or he might admit and exclude whom he pleased, and it might be worth the while of one person to give the lord a sum to exclude all others of the same trade, which would be quite contrary to the nature of the grant of a market, which is for the public good.

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As the law gives a right to every man to come to market to sell his goods, it will also give him the means of enjoying the end of his coming there; in all cases where a man releases the means of coming at any thing, he releases the thing itself; as if a man brings an action upon a bond, and then releases all actions, he thereby releases the bond. It is said we must ask leave, that is saying we have no right of coming into the market at all. If a grant be to a Duke to hunt, it extends to proper attendants upon him; the like points in 9 Rep. 49. 1 Sid. 430. Bro. Incidents, p. 8. 6 Mod. 149.

If the owner of the soil should take unreasonable stallage, inasmuch that if he were owner of the market it would be a forfeiture thereof; yet if the soil and market were in several persons, an *abuser* in the owner of the soil would not be a forfeiture of the market. A grant to hold a market in another man's soil would be void; the words piccage and stallage as well as toll are used in all antient grants of markets. In the case of an highway through the ground of the lord of a manor, the lord might as well say that toll is incident for going through it, as in this case of a public market; if in the case of Sir John Lade, (before cited) a bridge had appeared to have been necessary, the law would have allowed it; if there is any duty certain or uncertain, it is impossible to recover for it in trespass; and there seems to be no difference between this case, and *that*, where if a man does not pay toll, which is a certain sum, he is not a trespasser; *Wigley v. Peackby*, *Ld. Raym.* 1589. this question has been under the consideration of this court before in *Pasf.* 6. and *Hil.* 7 Geo. 2. *Quantum meruit* for stallage, the like for toll, and another count for toll and stallage, it was objected that an action of *assumpsit* would not lie; the court doubted as to toll and stallage in the same count, because toll is certain, and stallage uncertain, but agreed that a *quantum meruit* would well lie for stallage; concluded for the defendant.

Judgment of
the court.

November 15, in this term, *Lee* Chief Justice delivered the opinion of the whole court, and gave judgment for the plaintiff. And 1st, It was resolved, that, by law, every man has, of common right, a liberty of coming into any public market to buy and sell, without paying any toll, if it be not due by custom or prescription; but if he requires any particular easement or convenience, as a stall in the market, he must have the licence of the owner of the soil for that purpose, if there be no particular sum fixed by the custom of the market for stallage; if there be a fixed sum or duty by custom, *that* cannot be exceeded, but still he must agree with the owner of the Soil. *Spel. Gloss. verb. Stallangiator, i. e. Qui stationem (quod stallum & botham vocant) in foris habet, vel nundinis mercium vendandarum gratia—Quilibet stallangiator vel faciat finem cum preposito*

præposito (burgi) secundum quod cum eo convenire poterit, vel dabit obolum quolibet die fori; from hence, and the case in 1 *Ld. Raym.* 149. it is clear the defendant had no right of erecting a stall without making a satisfaction for it to the owner of the soil, and this is properly called stallage; if the pavement or soil be picked or dug up or broke, then it is piccage; and stallage shall go with the soil to the youngest son where it is *borough english*, though the market shall descend to the heir at common law. *Moor* 474. Toll can only be due by grant, custom or prescription; and it was said at the bar that stallage was a toll, and so called in some books, as in *Lutw.* 1518. but then it is a toll *sui generis*, and the owner of the soil is of common right intitled to stallage in a new erected market, and the soil is no farther appropriated to the public use than that every man has a legal right to enter into the market to buy and sell. *Palm.* 82. 2 *Inst.* 220, 221. 1 *Ld. Raym.* 149. The Ch. Justice said a market might not improperly be compared to a parish church, whither all the parishioners have a right to go to hear divine service, but have not liberty to furnish themselves with pews without the appointment of the ordinary; and the reason of the law being so, is for avoiding confusion and disorder in public meetings and assemblies; and that no case had been cited, nor could he find any in the books, to shew that a man, coming to a market, had a right to erect a stall without licence from the owner of the soil.

Secondly, it was resolved, that trespass was the proper action in the present case, and that neither debt nor *assumpsit* would lie, nor could the owner of the soil distrain, because there is not any certain fixed sum or duty, or contract express or implied; this is not a nonfeasance but a misfeasance, and is something like the case of the six carpenters, where if a person enters lawfully, and afterwards misbehaves, he becomes a trespasser *ab initio*. 8 *Rep.* 146. 2 *Rol. Abr.* 561. G. 1. Judgment for the plaintiff.

Alcorn Executor *versus* Westbrook. B. R.

SPECIAL action upon the case; the declaration sets forth, that whereas the plaintiff's testator *Manby* delivered to the defendant a certain writing obligatory, whereby one Lord Viscount *Gave* became bound to him in 300 *l. &c.* he the defendant, upon payment of 22 *l.* by the said *Manby* to him, promised to re-deliver the said bond to *Manby* upon request; and that the defendant notwithstanding he was requested, did not deliver the bond to the said *Manby* in his life-time, nor to the plaintiff since his death, to the plaintiff's damage. The defendant pleads *non assumpsit*, and upon Special action upon the case upon a promise to deliver up a bond pledged upon payment of money borrowed of the defendant. Breach assigned that defendant refused to deliver up the bond, and held well enough, although it is not laid that the money was paid or tendred, it having been proved at the trial that the money was tendred and refused.

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the trial at *Guildball* before *Lee* Ch. Justice, the evidence to support the plaintiff's case was, that *Manby* deposited this bond in the hands of the defendant as a pledge or security for the payment of 22 l. (together with another security) that *Manby* tendered the 22 l. to the defendant, and demanded the bond of him, which he refused to deliver; and it was objected for the defendant at the trial that the evidence doth not agree with the plaintiff's case, for it is not laid in the declaration that *Manby* either paid the 22 l. to the defendant, or tendered the money to him, and he refused it; and 2dly, That the bond is not rightly described in the declaration, for *there* it is Lord Viscount *Gave*, whereas the bond deposited and proved to be demanded was entred into by *Ld. V. Gage*.

Variance between the count and evidence in respect to the name of a person, helped.

This was made a case for the opinion of the court, and was argued by Sir *John Strange* for the plaintiff: 1st, That the evidence given sufficiently proved the plaintiff's case; and he cited *Price v. Brown* at *Guildball*, before Lord *Raymond*, after *Hilary* term 12 Geo. 1. which was debt on a bond conditioned for the payment of money at a future day; the defendant pleaded that after the day and before the bringing the action he paid the principal and all interest due thereon; the plaintiff replied, that he had not paid off all the principal and interest, and thereupon issue was joined; and it came out in evidence that he had not paid the whole, there having been a small mistake in calculating the interest; but it was at the same time proved that the defendant paid a sum in gross, which was accepted by the plaintiff in full satisfaction of all principal and interest due upon the bond; and though it was objected that the defendant ought to have pleaded according to the truth of his case, viz. That he paid a gross sum which the plaintiff had accepted in satisfaction, yet my Lord *Raymond* over-ruled the objection, and said the substance of the issue was with the defendant, and he had proved his plea sufficiently.

Evidence.

If the substance of an issue be proved it is sufficient.

As to the 2d objection that it was *Gave* in the declaration instead of *Gage*, he argued that it was only surplusage, and might be rejected, and it is *Gage* afterwards throughout, and the bond will be well enough set out if this word *Gave* be left out; the date of a bond need not be set out in trover for it. *Cro. Car.* 262.

Mr. *Martin* for the defendant, insisted, that the plaintiff had misconceived his action, and that there was no precedent of an *assumpsit* to deliver up a pledge in all the books, but the proper action is *trover* or *detinue* (which latter is now much out of use because of the tedious process as to garnishment); but supposing the present action will lie, it must be supported upon the foot of a special agreement, and it is universally laid down, that every special agreement must be proved in every title as it is laid. *Cro. Jac.* 583. 1 *Leon.* 241. 2 *Mod.* 279. 2 *Roll. Abr.* 719. and many other cases.

2dly, He insisted that a recovery in the present action upon this declaration cannot be pleaded in bar to another action to be laid properly, according to the truth of the plaintiff's case; and the rule for pleading recoveries in bar is well laid down in Sir Tho. Raym. 472. which is, that wheresoever the same evidence will maintain both the actions, *there* the recovery or judgment in *one* may be pleaded in bar of the *other*, but otherwise not; and a bond given by one *Gave*, is a different bond from that proved, which was by one *Gage*.

Lee Ch. Justice: I give no opinion, but as at present advised think the plaintiff is well intitled to bring this action in the manner he has done, and the evidence is sufficient to support it, that the tender and refusal of the 22 l. amounts to payment, and *Manby* did all he could. And as to the variation of *Gave* instead of *Gage*; it is *Gage* in the declaration throughout afterward; and I do not see why the word *Gave* may not be rejected.

Wright Justice: I should be willing to go as far as possible to assist the plaintiff, but this is a special action upon the case, which ought to be laid as proved; now upon the evidence it appears that the case laid in the declaration was not the plaintiff's case, but the true case is, that *Manby* borrowed of the defendant 22 l. and deposited the bond in his hands as a collateral security to be re-delivered upon payment of the 22 l. and that *Manby* tendred the 22 l. and defendant refused to accept it and deliver up the bond; now if this case had been laid in the declaration according to the truth, there could have been no doubt but the plaintiff would have been intitled to recover, but the tender and refusal is made no part of the case. And as to the variation, I think it a very material one, and difficult to be got over; however, I desire time to consider, and give no opinion at present.

Dennison Justice: If a man agrees to build for another a house to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement as to be performed *in futuro*, or upon an *indebitat' assumpsit*, or *quantum meruit*, when the house is actually built and the agreement executed. In the present case as the money was tendred and refused I consider it as paid; then the promise to deliver up the bond rises by operation or construction of law; therefore says the plaintiff I do not declare upon the original agreement but upon the promise arising by operation of law; and as to the point of the variation, I think the word *Gave* may be rejected, and there is sufficient evidence to prove the bond described in the declaration is truly the bond in question; and it is well enough after a verdict, however it might have been upon a demurrer, but as there seems to be some doubt in the court I give no opinion.

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Foster

Foster Justice inclined to be of opinion with the Ch. Justice, and *Dennison* for the plaintiff.

The court took time to consider, and afterwards on the 28th of *November* this term gave judgment for the plaintiff unanimously, that this action is well laid, and the evidence supported the case as laid, and that the word *Gave* was only surplusage. *Savil* 71. *Lutw.* 561. *Postea* ordered to be delivered to the plaintiff.

Hannah Welford, wife of John Welford, by her next friend, *versus* Hannah Beezley the elder, Joseph Beezley and John Welford defendants. In Chancery at the Rolls, December 11, 1745.

A mother who agrees to give her daughter a portion upon her marriage does not execute nor is party to the articles, but only sets her name as a witness, this is a sufficient memorandum in writing to bind her.

HANNAH Welford preferred her bill to have a specific performance of articles made upon her marriage with the defendant John Welford, setting forth that in 1730. a treaty of marriage was had between the plaintiff and John Welford; and after divers meetings thereupon by all the parties, Hannab Bezeley the defendant, and mother of the plaintiff, in consideration of the intended marriage agreed to give 1000 l. as a marriage portion with the plaintiff, to be laid out as set forth in the articles; and thereupon an indenture *tripartite* dated the 18th of July 1730. was made and executed (with the privity and consent of the plaintiff's mother) between John Welford of the first part, the plaintiff of the second part, and Joseph Bezeley of the third part, reciting that the marriage was then agreed shortly to be had between John Welford and the plaintiff, and that Hannab Bezeley the mother had agreed to advance and pay 1000 l. to be laid out in stock, as a portion for the plaintiff, to the uses therein mentioned in the name of Joseph Bezeley, that is to say, to the use of the plaintiff for her life, notwithstanding her coverture, and after her death in case the marriage took effect, then to her husband, his executors and administrators; which deed was executed by the plaintiff her husband, and Joseph Bezeley the trustee, but not by the mother, nor was she a party thereto, but was present at the execution, and signed her name as a witness to the same.

The mother by her answer admits the treaty of marriage, and says, that John Welford was represented to be in good circumstances, and in consideration thereof she agreed to give 1000 l. for the plaintiff's portion to be settled on her, and that this was all the agreement, that was before the marriage; she denies that the articles were made with her approbation, and says that at the time of the execution thereof she declared her dislike to the match, and was unwarily drawn in to set her name as a witness.

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The plaintiff proved that the mother before the marriage declared she would give the plaintiff 1000 *l.* with *John Welford* as a portion, and that the articles were read over at the time of the execution thereof in the mother's presence and hearing, and that she wrote her name as a witness thereunto.

The Master of the Rolls: I am very clear that the articles ought to be carried into execution, and that although the mother did not execute them as a deed, yet surely her setting her name as a witness thereto is some memorandum in writing, and sufficiently takes this case out of the statute of frauds; the portion was decreed to be placed out accordingly, with interest from the marriage until this time; and his Honour said, that if the mother had already paid the money to the husband and he had spent it, yet she should be obliged to pay it again, and must take her remedy against him. *Brown, Clarke, Wilbrabam and Wilson* for the plaintiff, *Floyer, Noell and Bicknell* for the defendants.

Hilary Term

19 Geo. 2. 1745.

Williams *versus* Wills. B. R.

THE defendant was arrested by virtue of a *latitat* at the plaintiff's suit, and being thereupon in custody of the sheriff of *Devonshire*, plaintiff declared against him in case upon several promises, complaining against him the defendant being in custody of the sheriff of *Devonshire*, by virtue of a writ of *latitat* issuing out of the court of the Lord the King before the King himself, without saying at whose suit he was so in custody; there was a general demurrer, and it was objected by *Agar* Serjeant, that the declaration was bad, not saying at whose suit the defendant was in custody of the sheriff of *Devon*; *Ford* for the plaintiff answered, that the objection went to the jurisdiction of the court, so came too late after an imparlance, and could not be taken upon a general demurrer.

In a declaration against a prisoner in custody of the sheriff it must be alledged at whose suit he is detained pursuant to stat. 4 & 5 W. & M. c. 21.

Lee Chief Justice: Before the *stat. 4 & 5 W. & M. c. 21.* there could be no declaration in this court against a defendant in the custody of a sheriff, and the practice was to bring an *habeas corpus*, and so turn him over to the marshal, and then to declare against him; therefore, to prevent that expense this act was made, and particularly enacts, that it shall be alledged in the declaration in what sheriff's custody the defendant is, and at whose suit.

As to the case of *Morris and Watkins*, *Ld. Raym.* 1362. I have a note of it which I have looked into; *That* was debt upon a bond, the court upon the same objection as is made at present upon a general demurrer, held that it must be alledged in the declaration at whose suit the defendant was in custody, as it was before held ill, *Hil. 8 Geo. 1.* in the case of *Stanton and Byerly*, where the declaration, (as in the present case,) was in *assumpsit* on promises, because not alledged therein at whose suit defendant was in custody; and the court adhered to this; but where it was in an action of debt, as the words of the declaration were *de placito quod reddat ei* so much money, that was construed to mean at the plaintiff's suit, the plaintiff complaining by his declaration that the defendant was in custody of the sheriff of *A.* in a plea that he render to *him*, which was as much as to say he was in custody at the plaintiff's suit; therefore as the statute has chalked out this particular manner of declaring against a prisoner, it cannot be deviated from. Judgment for the defendant *per totam curiam.*

Cresley *versus* Kell and others. B. R.

Special bail shall not be required in debt upon a judgment in trespass tho' above 10*l.* damages.

TRESPASS, assault and battery; judgment by default, and upon the writ of inquiry 20*l.* damages were assessed and ten pounds costs taxed; the defendant brought a writ of error, and while that was pending the plaintiff brought an action upon the judgment, and made an affidavit that 30*l.* was due to him thereupon, and held the defendant to special bail, who now moved by *Lawson* that common bail might be only taken; *Morton* for the plaintiff insisted that this judgment was a record of a debt.

But *per Dennison and Foster* Justices only in court, where a judgment is not for an original debt or sum due above 10*l.* the court will not hold defendant to special bail, and the defendant was discharged upon common bail, and declared they were for discouraging these actions on judgments, and that proceedings in this suit ought to stay while the writ of error is depending.

Rex *versus* The Inhabitants of the parish of Bray. B. R.

JOSEPH Gold came with his wife by certificate from the parish of *Shottesbrook* to the parish of *Bray*, and there had a son born who lived there until he was 20 years old, and then hired himself to, and served a master a year in *Bray*, and had not gained any other settlement in *Bray*. *James* the son became chargeable, and by order of two justices was removed to *Shottesbrook*; *Shottesbrook* appealed, and the sessions quashed the order of the two justices, and sent the pauper back to *Bray*; and now upon considering the *stat. 9 & 10 W. 3. c. 11.* which enacts, that no person or persons who come in by certificate shall be adjudged to gain a settlement by any act whatsoever, except he rents 10 *l. per ann.* or executes an annual office. The court held that *James* the son of the certificate man was equally within the statute with his father, and that the hiring and service in this case gained him no settlement at *Bray*; so the order of sessions was quashed, and the order of two justices confirmed.

Certificate-man has a son born who lives till 20 years old and then serves a year, this gains the son no settlement.

Anonymous. B. R.

A Third person makes affidavit in order to hold defendant to special bail, "That he was indebted to the plaintiff in 800 *l.* as appeared by an account stated and under the defendant's own hand;" Mr. *Henley* moved that common bail might be accepted; and *per curiam*, this affidavit is not sufficient, for the plaintiff may have been paid the debt, and this account may be discharged for any thing the person knows who makes this affidavit, so common bail was ordered. *N.* Such affidavit is bad when it says, "As appears by such a note or bond," &c.

What is an improper affidavit to hold to bail.

Leafe *versus* Box. B. R.

DEBT upon a bail-bond assigned to the plaintiff; the defendant demurs, and assigns for cause; 1st, That it is not averred or set forth in the declaration that the indorsement was attested by two credible witnesses; 2^{dly}, That the names of the two witnesses are not set forth in the declaration, and there ought to be a *profert in cur'* of the assignment. Serjeant *Belfield* for the defendant; the names of the two witnesses to the indorsement ought to have been set forth, because the act of parliament directs, that the assignment shall be made by the sheriff under his hand and seal in the presence of two credible witnesses; and it is necessary to set forth the names

Profert not necessary to be made of an assignment of a bail-bond, nor the witnesses names thereto necessary to be set forth in the declaration.

of the witnesses, because upon *assignavit vel non* if one of the witnesses be infamous, then it is not assigned according to the statute, which says they are to be credible witnesses.

Draper Serjeant for the plaintiff: These two objections have been made and over-ruled twenty years ago, and often determined that there is no occasion to set forth that the indorsement was attested by two credible witnesses, nor to make any *profert* of the assignment, nor to set forth the names of the witnesses; the assignment of a bail bond is not a deed, so no need of a *profert* thereof, no more than there is to make a *profert* of an award; but if a *profert* was necessary, there is a *profert* made of the bond, the indorsement being upon it is sufficient; the statute does not say that the witnesses shall sign their names as witnesses to the assignment, but only says, that the sheriff shall assign the bond in the presence of two credible witnesses.

Belfield in reply: It is said the assignment is not a deed, but I think it is more than a deed, for by a deed a man cannot assign a *chose in action* legally, but by this the sheriff is enabled to assign a *chose in action*.

Rollison v.
Taylor, Trin.
13 Geo. 1.
S. P.

Wright Justice: It is averred in this declaration that the sheriff of *Southampton* assigned this bail-bond by indorsement upon the said writing obligatory, and attesting it under his hand and seal in the presence of two credible witnesses; the same objections were made in *Rollison v. Taylor*, Trin. 13 Geo. 1. where it was shewn for cause of demurrer, that it was not averred that the assignment was attested by two credible witnesses, and that there was no *profert* made of the indorsement; as to the 1st it was answered and resolved, that as it was averred that the assignment was made in the presence of two credible witnesses it was well enough; as to the 2^d, that there being a *profert* of the bond that is a *profert* of the assignment also; but there is another reason, and that is the assignment is not a deed, so no *profert* is necessary; the answer as to the setting forth the names of the witnesses is that the statute does not require it. *Dennison* and *Foster* Justices of the same opinion; and judgment for the plaintiff, the Chief Justice absent.

Harding *versus* Holmes. B. R.

Departure.

DEBT upon bond; the defendant demanded *oyer* of the condition, which was for the performance of an award, and pleaded that the arbitrators made no award; the plaintiff replied, and shewed an award and the non-performance thereof by defendant in non-payment of 16 l. 13 s. awarded to the plaintiff; the defendant

dant rejoined, and said that there was other causes between the parties depending, as a cause of action for 4 l. 4 s. and another for a gun, and that as the arbitrators had taken no notice thereof it was no award: hereupon the plaintiff demurred, and the defendant joined in demurrer. Now *Ford* for the plaintiff insisted, that the defendant in his rejoinder had departed from his plea, and cited 1 *Sid.* 180. as in the very point. 1 *Lutw.* 182. 1 *Lev.* 85, 127. *Ray.* 94. The court were inclined to give judgment for the plaintiff, but *Poole* for the defendant prayed it might stand over till next term. 2 *Saund.* 188. cited by *Dennison* Justice as in point for the plaintiff. *Adjournatur.* Afterwards in *Trin.* 19 & 20 Geo. 2. *Poole* for the defendant gave it up, and there was judgment for the plaintiff.

Lowfield and Satchwell. B. R.

DEBT upon a bond; the defendant craves *oyer* of the condition, which recites, that whereas *Thomas Taylor* hath sued out and delivered to *R. Westbrook* mayor, and *R. Ladbroke*, &c. sheriffs of *London*, the King's writ to correct the errors in the record of a judgment in one of the city courts, between *Thomas Taylor* and *Ann Lock*: now the condition of this obligation is such, that if the said *Thomas Taylor* shall prosecute his said writ of error with effect, and shall satisfy and pay the said *Ann Lock* the damages and costs within fourteen days next after the affirming the said judgment, that then the said obligation shall be void, which being read and heard, the defendant pleads that the said *Thomas Taylor* hath prosecuted his said writ of error with effect, and that the said writ of error is still depending, and that the judgment hath not yet been affirmed. The plaintiff replies that after the sealing and delivery of the said writing obligatory at the court of *Hustings* holden in *Guildhall* in the city of *London*, according to the custom of the said city, on *Monday* next after the feast of *St. John the Baptist*, the said *Ann Lock* appeared, and the said *Thomas Taylor* being solemnly called did not appear; therefore it was considered that the said *Thomas Taylor* should take nothing by his writ, and that the said *Ann* should go without day; the defendant demurred to this replication, and shewed for cause, 1st, That it does not appear before whom the court of *Hustings* was holden at the time of giving the judgment, 2^{dly}, Because it does not appear whether at the time of holding the said court of *Hustings* the said writ of error was returnable; the plaintiff joined in demurrer; upon the 1st argument by Sir *John Strange* for the plaintiff, and Serjeant *Draper* for the defendant, the court (*absente* *Lee C. J.*) gave judgment for the plaintiff.

Wright

Wright Justice: As to the 1st objection, it is set forth that at the court of Hustings holden at *Guildhall* on such a day according to the custom of the city, &c. which is well enough and is agreeable to all the entries. *Rast. Ent.* 303. a. 334. b.

In answer to the 2^d objection: The defendant in his plea says that he hath prosecuted the writ with effect, and that it is now depending, which shews that it is returnable; but besides this, if it really were not returnable, it cannot be taken advantage of in this action.

Dennison Justice: The condition of the bond is of two things to be done, 1st, To prosecute the writ of error with effect, 2^d, To pay the damages and costs within a certain time if judgment be affirmed; the defendant in his plea says he has prosecuted the writ of error with effect, but to discharge himself, goes on and says that the judgment is not yet affirmed; the plaintiff has replied the record of the court, that at the court of Hustings holden according to the custom of the city, there was a judgment that the plaintiff in error should take nothing by his writ, and that the said *Ann* should go without day *prout patet per recordum*. The objection is, that this court was not properly holden, as being *coram non judice*, but that cannot be made a question here, in an action of debt on a bond; but if it was improperly holden you must bring error in that cause; but it is well enough, being alledged to be holden according to the custom of the city. As to the 2^d objection; it would be very strange for us to presume that the writ was not returnable: If the defendant had rejoined *nul tiel record*, we should have seen how the record was, but as the matter now appears to us upon the pleadings we must take it to be right, it being said to be according to the custom of the city. *Foster* Justice of the same opinion.

Pond *versus* King. B. R.

Proceedings
by consent
after the
plaintiff's
death, and the
judgment to
be entred as
in his life-
time.

THIS was an action upon a policy of insurance tried at *Guildhall London*, at the sittings after last *Trinity* term, before *Lee* Ch. J. the jury found a special verdict, which is drawn up, but since the beginning of this term the plaintiff died; Sir *John Strange* now moved that a rule might be made by consent of Sir *Richard Lloyd*, counsel of the other side, that to prevent the expence of another trial, whatever judgment the court shall give might be entred as a judgment of the first day of this term, and that no writ of error in fact should be brought, which was ordered accordingly.

The

The King *and* The Justices of Peace of Middlesex. B. R.

SIR *John Strange* moved for a *mandamus* to be directed to the justices of peace of the county of *Middlesex* to swear *Wm. Carr* late overseer of the poor of the parish of *St. Andrew* above the bars and *St. George the Martyr* in the said county, to the truth of his accounts, upon an affidavit made by *Carr* that he had delivered in an account to the justices, and was ready to swear to the truth thereof according to the statute of 17 Geo. 2. c. 38. but that they had refused to swear him to it.

Mandamus to the justices of *Middlesex* to swear an overseer to his accounts, according to stat. 17 Geo. 2. c. 38. is of course.

Sir *Richard Lloyd* for the justices opposed it, and shewed for cause that when *Carr* delivered in his account, it consisted of gross sums, and that the justices asked him some questions touching the particulars, which he refused to answer, and therefore they refused to swear him to his account.

Wright Justice: This court has two jurisdictions over justices of peace; 1st, To punish and restrain them when they exercise a jurisdiction which they have not; 2^{dly}, To compel them by *mandamus* when they refuse to do what they by law ought to do: this motion is founded on the stat. 17 Geo. 2. c. 38. which requires the justices to do a thing which they have refused to do; if the justices apprehend that this stat. has not repealed the stat. 43 Eliz. as to overseers accounts, they may return that matter upon the *mandamus*, and then they will have the judgment of the court whether they are obliged to swear *Carr* before he has accounted according to the stat. 43 Eliz. but we cannot refuse to grant the *mandamus*, for it is a motion of course; *Dennison* and *Foster* of the same opinion that it was a motion of course. *Mandamus* granted.

Sir *Watkin Williams Wynne* Baronet, *versus* *Middleton*, sheriff of *Denbighshire*. In the Exchequer-chamber.

THIS is a special action upon the case upon the statute 7 & 8 W. 3. c. 7. for preventing false and double returns of members to serve in parliament, whereby it is among other things enacted that the party grieved (to wit, every person that shall be duly elected to serve in parliament for any county, &c.) by such false return may sue the officers making the same in any court at *Westminster*, and shall recover double the damages he shall sustain by reason thereof with his full costs of suit.

An action for a false return of a member of parliament on the 7 & 8 W. 3. for double damages is remedial, though founded on a law that is penal, so within the statutes of jeofails.

K k

This

This action was commenced in the King's Bench, the declaration sets forth the writ for electing a member for the county of *Denbigh*, by which the sheriff was commanded to proceed to an election, that it was delivered to the defendant being sheriff before the return thereof, that he proceeded in order to an election, that the plaintiff and one *J. Middleton* were candidates, that the plaintiff had a majority of votes, that the defendant made indentures between him and *J. M.* the other candidate, and returned him to parliament, whereas it is averred that *J. M.* was not elected, but that the plaintiff was elected; that two petitions were presented to the house of Commons, one by the freeholders of the county, the other by the plaintiff himself; that the house thereupon resolved that the plaintiff was duly elected, and ought to have been returned, and ordered the return to be amended, and the plaintiff's name to be put in the indenture, and this is laid to be contrary to the form of the statute, and to the damage of plaintiff of 6000 *l.* Upon Not guilty the cause was tried in the King's Bench, where the jury gave a verdict for 1400 *l.* damages, whereupon that court gave judgment for the plaintiff for 2800 *l.* being double the damages found, and for 414 *l.* costs of suit, which said damages, costs and charges, amount in the whole to 3214 *l.* and the judgment concludes thus, *and the defendant in mercy.*

A writ of error is brought in this court, and two special errors are assigned; 1st, That there is no *venire facias*; 2^d, That there is no *distringas juratorum*, and then the general errors are assigned; two *certiorari's* have issued, and the court of King's Bench have certified a *venire facias* and a *distringas*, and the jury appear to be of the body of the county, and not *de vicineto*; the two particular errors are out of the case, a *venire* and a *distringas* being both returned, therefore this case comes before this court upon the general errors only, and was three times argued in the most solemn manner, and the last time by the Attorney General and Mr. *Evans*, before *Willes C. J.* of the Common Pleas, *Parker Ch. Baron*, *Abney* and *Burnett* Judges of the C. B. and *Reynolds*, *Clarke* and *Clive* Barons, and this term *Willes C. J.* delivered the opinion of the court.

Willes Ch. Justice: The first objection taken by the plaintiff in error is, that the *stat. 7 & 8 W. 3. c. 7.* is a penal law, and excepted in the *4 & 5 Ann. c. 16.* and therefore the *venire* ought to have been *de vicineto*, and not *de corpore comitatus*; we think that this is not a penal statute, but if it be, it is also a remedial law; but supposing this be a fault, it is cured by the *stat. 16 & 17 Car. 2. c. 8.* and we have no doubt at all but it is cured by *stat. 5 Geo. 1. c. 13.* which enacts, that no judgment shall be reversed for any defect in form or substance in any bill, writ, &c. so that, be this a fault either in form, or substance, this statute cures it.

The 2d objection is to the form and substance of the judgment; 1st, to the form, that it is not said to be given *secundum formam statuti*, but we are of opinion that as the declaration has set it forth to be a matter done by defendant *contra formam statuti*, it would have been nugatory to have added it again in the judgment; the issue to be tried was, whether the defendant was guilty against the form of the statute; the jury have found him so, and therefore the judgment is so too. 2dly, To the form and substance both, viz. That it concludes with *misericordia* instead of *capiatur*; though we do not all agree that this is right, yet the greater part of us agree it is, for in all actions of trespass on the case (which this is) if the defendant be found guilty the judgment shall not be *quod capiatur*, but *quod sit in misericordia*. 1 Rol. Abr. 222. p. 11. so in debt on stat. Ed. 6. for not setting forth tithes it shall be *misericordia*. 1 Rol. Abr. 223. p. 17. Cro. Car. 559, 560. Plowd. 118. 130. b. Action on the stat. Hen. 6. judgment is *in misericordia*. We think this the right judgment, and better than if it had been *quod capiatur*. But supposing the judgment being *in misericordia* was wrong, yet as we are of opinion that this action is to be considered as remedial, it is expressly aided by the stat. 16 & 17 Car. 2. c. 8. being after a verdict; and in *Comyns* 284. it is held that the statutes of *Jeofails* extend to actions remedial, though they are founded upon penal statutes; we think that if this were a fault, the stat. 4 Geo. 2. c. 26. for turning the law into *English* has cured it, which has this most remarkable conclusion, that every statute of *Jeofails* shall extend to all proceedings in *English*, and then declares that this clause shall be taken and construed in all courts of justice in the most ample and beneficial manner for the ease and benefit of the parties, and to prevent frivolous and vexatious delays.

The next objection is, that double damages can only be recovered in respect of the return being contrary to the last resolution of the house of Commons, and that it does not appear that there was any last resolution of the house; but we are all of opinion, except *Abney*, that this action is well brought, and that double damages shall be recovered for any false return; and we are not bound by law to take notice from time to time of the particular resolutions of the house of Commons, who of themselves cannot make a law. The case of *Prideaux v. Morris* was an action at common law, so not to the present purpose. But whatever may have been the opinion of Judges, I am very clear myself, that an action at common law will well lie, both for a false, or a double return of a member, for there is *dampnum cum injuria* in both cases, and I shall always set my face against the case of *Prideaux* and *Morris*; I do not give this as the opinion of all of us, but only say it by the bye as my own opinion, for I think there cannot be a greater damage in the world; there would be I think the greatest inconvenience if the doctrine should prevail

3 Lev. 29.

2 Lev. 114.

1 Lutw. 82.

89.

2 Salk. 502.

503.

Farrel. 13, 14.

prevail that there must be a determination in the house of Commons as to the election, before the action for a false return can be brought, for if so, it would be in the power of the house, to repeal this act of parliament by contriving to put off a petition from time to time for two years, within which time this sort of action must be brought. I declare for myself, that I will never be bound by any determination of the house of Commons against bringing an action at common law for a false, or a double return, and a party injured may proceed in *Westminster-hall* notwithstanding any order of the house, for the members are not upon oath, nor can they administer an oath to witnesses; and it would be very extraordinary to say, that we, who are Judges upon oath, should be bound by a determination of persons not upon oath; in trying such action for a false return, I would pay great regard to a determination of the house, but yet I would go on. Upon the whole, the court were of opinion that all the faults objected were cured by the verdict, and the judgment was affirmed.

The King *versus* Bestland. B. R.

Order of sessions for appointing one overseer of the poor confirmed.

THIS is a rule to shew cause why an order of two justices, and another of the sessions confirming it for appointing one overseer of the poor only, which is not according to the *stat. 43 Eliz.* which says, that four, three, or two may be appointed, but says nothing of one. *Per curiam*, The justices may appoint one at a time, and we do not know but they have appointed, or may appoint another, and the court will not presume they have not, and discharged the rule, and the orders confirmed.

N. Lee C. Justice was taken ill of the gout the 27th of January this term, and continued so until the end thereof.

Douglas *versus* Vane. In Chancery.

Court of Chancery will not dismiss bill for tithes, and leave plaintiff to his suit in the spiritual court, unless there be a good, legal or equitable bar. Compositions by parson, patron and ordinary, have been confirmed by decree, since the restraining statutes.

PER Lord Chancellor: This court never has dismissed bills for tithes, to leave plaintiffs to their suits in the spiritual court, or at law, but only dismissed them when there has appeared to be any good, legal or equitable bar, or defence. Before the restraining statutes, parsons could not alien or make agreement to bind the inheritance of the church without the consent of the patron and ordinary; and since the statute it has been doubtful whether such agreement so confirmed should be carried into execution; but I do agree there have been cases since the statute, where decrees have been made to confirm *compositions* relating to the rights of the church, which have been by the consent of the parson, patron and ordinary, but this has been always where such compositions have been presumed to be for the benefit of the church.

Easter Term

19 Geo. 2. 1746.

Baxter *versus* Faulam. B. R.

THE single question in this case is, whether an indenture of Six pence apprenticeship where six pence is mentioned to be the only given sum given with the apprentice be or be not void for want with an apprentice, the indenture of being stamped, according to *stat. 8 Ann. c. 9. sec. 32.* need not be stamped according to *stat. 8 Ann. c. 9. f. 32.* and resolved by the whole court, that the statute intended that when above 50 *l.* was paid with an apprentice, a twentieth part thereof should be paid for the duty, and one fortieth part when less than 50 *l.* was paid; and this is a case wherein it is well known there is no coin small enough can be paid; and it seems by the two stamps of 1 *s.* and 6 *d.* in the pound, that no sum less than 20 shillings paid with an apprentice should pay any duty; and this case falls under the saying of *de minimis non curat lex*; and there was no occasion to have this indenture stamped according to the said statute.

Kill *versus* Hollister. B. R.

THIS is an action upon a policy of insurance, wherein a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration; and the plaintiff avers in his declaration that there has been no reference; upon the trial at *Guildhall* the point was reserved for the consideration of the court, whether this action well laid before a reference had been, and by the whole court if there had been a reference depending, or made and determined, it might have been a bar, but the agreement of the parties cannot oust this court, and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

Action on a policy of insurance lies, though the policy says the matter shall be referred in case of a loss or dispute.

Anonymous. B. R.

Leave to
compound in
a prosecution
on the statute
against ga-
ming.

POOLE moved on the part of the prosecutor upon the statute against gaming for leave to compound, upon an affidavit that the defendant and one *A. B.* used to play at cards together, and that the defendant had won divers sums of money of *A. B.* that *A. B.* was become a bankrupt, and that the assignees, who set this prosecution on foot, were satisfied with respect to the defendant, and therefore it was now moved that the prosecutor might have leave to compound; which was granted by the court.

Anonymous. B. R.

Infant lessor
in ejectment
must get some
person to be
security for
costs.

MR. *Henley* moved on the part of the defendant in ejectment that proceedings might be stayed until the lessor of the plaintiff, who was an infant, had got somebody to enter into a rule to pay defendant his costs, if there should be a verdict for the defendant, because the lessor himself being an infant, was not liable for costs. Rule to shew cause; afterwards made absolute.

Rhenish *versus* Martin. In Chancery.

Legacy to a
daughter pro-
vided she
marry with
consent of
trustees; she
marries with-
out their con-
sent.

LORD *Hardwicke* Chancellor: *Eliz. Phillips*, the mother of the wife of the plaintiff, and of the wife of the defendant *Martin*, by her will dated the 27th of *October* 1729. devised her real estate to her daughter *Martha* and her heirs for ever; and then says, "It is my will that if my said daughter *Martha* shall intermarry with any son of *A. B.* such my devise to be void, and in that case I devise my real estate to trustees for my daughter *Mary* and her heirs of her body;" then comes the clause upon which the question in this case arises. "Provided always, and it is my will, that if my said daughter *Mary* shall marry, and with the consent of my trustees aforesaid, or the major part of them, before such marriage had, signified in writing, then and not otherwise I give and devise to my said daughter *Mary* 800 *l.* and it is my will that my said daughter *Martha* shall pay my said daughter *Mary* 30 *l.* yearly, during the said *Mary*'s continuing sole and unmarried, by 15 *l.* every *May-day* and *Michaelmas* day; and I do hereby charge and load all my said real estate with all my debts and legacies of all kinds, and appoint my daughter *Martha* sole executrix and residuary legatee.

Eliz.

Eliz. Philips the testatrix died in 1736. the plaintiff intermarried with her daughter *Mary* 27 Sept. 1737. but no consent of the trustees was had previous to the marriage; and this bill is brought by the plaintiff as administrator to his wife *Mary*, for payment of the said 800 *l.* and the arrears of the said annuity.

The question is, whether the plaintiff is intitled to this legacy of 800 *l.*

1st, I shall consider it as if it had been a mere personal legacy only, and payable out of the personal estate.

2^{dly}, I shall consider it as supposing it had been charged upon the real estate originally.

And 3^{dly}, I shall consider it as an original personal legacy charged upon the personal estate, and that the real estate is an auxiliary fund, in case the personal estate shall not be sufficient to pay all the debts and legacies.

As to the first; considering it as a personal legacy, and payable out of the personal estate; according to the rules established both in this, and the ecclesiastical court, the plaintiff as representative of his wife will have a right to recover it out of the personal estate, for in both courts such condition has always been considered only *in terrorem*; and indeed the civil law makes such conditions void, notwithstanding the legacy be given over, as to pious uses, or for manumission, &c. but that has not been received so, in this court, but when ever the legacy is given over for breach of the condition, the gift over shall take place upon this foundation, because it thereby appears clearly that the person, to whom it was given over, was in the mind and contemplation of the testator at the time of making his will, but in the present case there is no such gift over; it was objected by the counsel for the defendant at the bar that this was a condition precedent, and not subsequent; and this difference was insisted upon, that in the first case the condition must be performed before the legacy can vest; in the latter, that the legacy vests immediately, but must be divested by non-performance of the condition; and it was said that this was a distinction that has been established: but neither the civil law, nor the ecclesiastical law, have made any difference whether it is precedent or subsequent, for both those laws say, the condition is void; to prove this, *Swinb. p. 4. c. 12.* where there are many cases put, the greater part whereof are of conditions precedent: all conditions impossible, *legibus interdictu*, or *probrosa*, by the civil law, are void, and the legacy is absolute and without condition; *Comyns 738.* therefore it is not material whether it be precedent or subsequent, since (as in this case) it is void by the civil law: as therefore the difference taken would not

not prevail in the civil law, neither can it here, for this court, in the case of personal legacies will, and always hath followed the ecclesiastical court.

2dly, If this legacy had been charged upon the land, how far in that case the plaintiff would have been intitled to it supposing the condition not performed: it must be understood in what manner this is charged upon the land; first it is given to the daughter as a personal legacy, but afterwards follow these words, "I do charge" all my real estate with my debts and legacies;" if the legacy had been originally charged upon the land, and given upon the condition before mentioned, it could not have been contended that the plaintiff could have recovered it after breach of the condition; and indeed it would be contrary to the rule of the common law (to decree it to the plaintiff) which always favours the heir, and contrary to the determination of the Judges in *Harvey* and *Ashton*, for the difference taken there is, that this court follows the rule of the civil law, because that was the original jurisdiction for the recovery of personal legacies; but whenever land is in question, or to be affected, this court follows the rule of the common law; and in all cases, whereof this court takes consance of suit, where the original jurisdiction arises in another *forum*, the rule of this court is always to follow the law of that *forum* or court, for, if this court did not pursue that rule, there would be different remedies in different courts, which would create great inconvenience, and the rule of right would be different in different courts; but though this be so in the case of a personal legacy, it is not so in regard to lands affected or charged with legacies, because the property of land must be governed by the law of *England*, and where it is a legacy charged upon land, it must have the same consideration as a devise of the land itself would have had. *Vide King and Withers, Preced. in Canc.* 350. *Porter and Fry, 1 Vent.* 199. *Harvey and Ashton, Comyns* 726, &c. and three cases therein cited, *viz. Fleming v. Waldegrave, 1 Cha. Cas.* 58. *Needham v. Vernon, temp. Ld. Nottingham. Sembill v. Bailey, Prec. in Canc.* 562. *Vide 2 Vern.* 416, 452. I am of opinion, if this case stood as an original charge upon land, the plaintiff could have no right to demand it.

As to the third consideration; this being an original personal legacy, the plaintiff is intitled to have an account of the personal estate of testatrix, but not of her real estate: so that another question arises in this case, *viz.* whether this court should not marshal the assets of the testatrix in such a manner as if possible to give the plaintiff satisfaction for this legacy; and I am of opinion this court ought to do so, the other legatees and creditors in this case have both the real and personal estates for their security; here is a personal legacy payable out of the personal estate, but it cannot charge the real estate directly;

directly; then the question is, whether this court shall not turn all the rest of the legacies and debts upon the real estate, and leave so much of the personal estate as shall be sufficient to pay this legacy; and I am of opinion this court should do so; and the Ld. Chancellor decreed for the plaintiff accordingly.

The Parish of St. Luke *versus* The Justices of Middlesex.

RULE to shew cause why the court should not grant a *mandamus* to the justices, commanding them to make out a warrant of distress to levy the poor's rate grounded upon an affidavit, where-
 by it appears that a poor's rate has been made, and that some of the parishioners have refused to pay it, but that the justices refuse to grant a warrant of distress without first summoning and hearing the parties.

Mandamus to the justices of peace to make a warrant of distress for the poor's rate.

Per three Judges contra Wright J. a *mandamus* must go, for by the same rule that the court grants a *mandamus* to make a rate, they ought to grant a *mandamus* to make a warrant to levy that rate. And the rule was made absolute; the justices may return what they please upon it.

Trinity Term

19 & 20 Geo. 2. 1746.

Nott un', &c. *versus* Oldfield. B. R.

Practice.

Where bail is filed there must be a plea demanded in writing, although a notice to plead be upon the declaration.

THE *latitat* was returnable the second return of last term, being the 22d day of *April*; on the 24th of *April* a declaration was left in the office *de bene esse*, with notice on the back thereof to plead in four days; upon the 26th of *April* the defendant put in special bail, and gave notice thereof to the plaintiff's attorney; and a rule to plead being entred in the office, the plaintiff's attorney, when that rule was out, signed judgment without demanding a plea; and now it was moved by Sir *John Strange* to set aside this judgment for irregularity in not demanding a plea; Sir *Richard Lloyd* and Mr. *Ford* for the plaintiff insisted, that by the rule of court of the 10th *Geo. 2.* there was no occasion to make any other demand of a plea besides the notice to plead on the back of the declaration, which was sufficient. But *per curiam*, The rule was only made to enable plaintiffs to proceed before bail was put in and filed, and made no other alteration in the practice; for wherever a rule is given to plead, and the defendant files bail in time, (as here he has done,) a plea must be demanded in writing, and the judgment must be set aside with costs.

Smith Executor of *Cod* *versus* Hill Executor of *Clark*.
B. R.

Limitation of action.

If plaintiff be in England at the time the cause of action accrues, the time of limitation begins to run, so that if he, or (if he dies abroad) his executor or administrator, do not sue within six years, they are barred by the statute.

ACTION upon a promisory note dated 1734. defendant pleads that *J. Clark* his testator in his life-time did not undertake within six years: the plaintiff replies that *Jos. Cod* his testator, after the making the promise (by *Clark*) on the 20th of *August* 1736, went out of the kingdom of *Great Britain* into *Ireland*, and lived beyond sea till his death, and being so beyond sea made his will, and appointed plaintiff executor thereof, and afterwards, within six years after making the said promise, plaintiff's testator died beyond

sea, and that the plaintiff himself at the time of his testator's death was also beyond sea, and in *April* 1740. arrived in *England*, which was his first arrival here; and that the plaintiff forthwith after his arrival duly proved the will, and within six years after his said arrival in this kingdom filed his bill in this cause; defendant demurs; and the plaintiff joins in demurrer.

Poole for the defendant objected that the replication is ill, because it does not say that the plaintiff's testator was out of the kingdom at the time the cause of action accrued, but that he departed the kingdom after the making of the promise; and there is no new cause of action, for the plaintiff as executor must proceed upon the old cause of action; and if the plaintiff be in *England* at the time the cause of action arises, as the plaintiff's testator was, the time of limitation begins to run; and of that opinion were the whole court, and gave judgment for the defendant. *Stracey* for the plaintiff.

Wheeler & Ux' *versus* Philadelphia Bingham and Richard Bingham, Esq; In Chancery, June 14, 1746.

JOHN Pottinger by his will dated the 30th of *April* 1730. devised all his real and personal estate to trustees, upon trust that they should pay to each of his granddaughters which should be living at the time of his death 1500 *l.* upon the several and respective days of their marriage; "And I desire that none of my said granddaughters shall marry without the consent of their father and mother, or the survivor of them; if therefore any or either of them shall marry without such consent, I hereby revoke what was before directed to be paid to such granddaughters, and such of them shall not be intitled to any benefit by virtue of my will, further than what their father and mother, or the survivor of them, shall direct or appoint; and if any sum of money shall be remaining in the hands of the said trustees, that the interest of such sum of money shall be paid to my daughter *Philadelphia Bingham* during her life, and after her death the principal shall be paid to *Richard Bingham, Esq;*"

A legacy is devised to a granddaughter to be paid on her marriage, and if she marry without consent, "I hereby revoke what was before directed to be paid her," is only in terrorem.

Leonora, one of the testator's granddaughters, married the plaintiff *Wheeler* after her father's death, without the consent of her mother *P. Bingham*, one of the defendants; and the plaintiffs preferred their bill to have *Leonora's* legacy of 1500 *l.* with interest from the day of their marriage.

Lord Chancellor: The desire of the testator that his granddaughters should marry with the consent of their father and mother, or the

the survivor of them, was very right; and if this was *res integra*, I should have gone as far as I could to prevent the legacy from taking place, but there have been such a number of resolutions and decrees passed in this court in similar cases, that were I to go contrary to them, it would be to unfix the settled rule in devises of this kind, and doing a greater mischief to many, than any particular good in one case can warrant.

The first question is, whether the condition annexed to this legacy is effectual to prevent the granddaughter *Leonora* from having her legacy, or whether the court shall consider it only as inserted in the will *in terrorem*?

2dly, Whether there is any bequest *over* of this legacy, or any thing in the will that amounts to such a bequest *over*?

Harvey v.
Ashton,
Comyns 734,
738.

Porter v. Fry,
1 Mod. 308.

And first, to prove that it is a condition that ought to have its effect, it was argued for the defendants that it amounts to a condition precedent, and therefore, by the rule of law, the person intitled must shew it to be performed; but the answer to this is, that it is a personal legacy (for Mr. *Bingham* the defendant has admitted personal assets sufficient) and therefore (if not given *over*), must be governed by the rule of the ecclesiastical courts and the civil law, by which this condition is void, and the legacy will be absolute without any condition; and consequently it is immaterial, whether it be precedent or subsequent, since it will be null and void; and it would be strange, when the law makes a condition void, and saith the legatory shall be discharged from the condition generally, to say it shall be so *only*, where the condition is subsequent, not where it is precedent; the true reason why this court holds a pecuniary legacy given on condition that the legatee shall not marry without consent ineffectual, is, to preserve an uniformity in the determinations upon this point, in *this* and the ecclesiastical court; for since pecuniary legacies may be sued for there where such a condition as this would be held void, it would be extremely inconvenient if this court was to decree contrary to the ecclesiastical courts.

I take this to be a condition subsequent; and although it has with some truth been said at the bar, that the legacy did not vest until the marriage, and *that* being without consent (it was said) the legacy was *eo instante* divested; yet there is a difference in the operation of law, and in the order of things; and I think a subsequent consent of the mother after the marriage would have been sufficient to make the legacy good to *Leonora* although it had been given over; and so in the order of things, for it has been truly said by Mr. Solicitor General for the plaintiff, that she need shew nothing but her marriage, neither

neither here, nor in the ecclesiastical court, when she comes for her legacy, and it must come from the other side to shew it was without consent.

But *2dly*, it is said that if this be not a condition precedent, yet it ought to have its effect, because here is *that* which amounts to a devise of the 1500 l. over; as *1st*, The plain intention of the testator, and *2dly*, A gift of the interest to the mother for life, and of the principal, to the defendant *R. Bingham* after her death.

As to the *1st*, There have been many cases in this court where the intention of the testator has been as clear as the sun, that a daughter marrying without consent shall not have the legacy, and yet this court has always decreed it to be paid, when it is a pecuniary personal legacy, and not devised over; and therefore the court is not governed in this by the intention of the testator, but chiefly has regard to that justice which it ought to do, with respect to the right of a third person to whom a legacy is devised over upon breach or non-performance of a condition, whom the testator at the time of making his will had in contemplation as much as any thing else; indeed the court in such cases has often said, where there is a devise over to a third person, it thereby appeared to be the intent of the testator, that *that* person should have the benefit of the bequest over, but that was said only to prove the right of such devise over; therefore the determinations of this court in this point do not solely depend upon the intention of the testator, but upon the right of the legatee over, which cannot be taken from him.

And therefore whether there is any thing here that amounts to a bequest over in point of right is the 2d question; and I am of opinion there is not; I agree that if it had been said in the will, that in case my granddaughter marry without consent, I revoke her legacy, and give power to my daughter to dispose of that sum to such uses as she shall think fit; *that* would have been a gift over, for it would have amounted to a gift of the property: but the gift in the present case does not amount to that, for it is only an abridgment, or a power to the father and mother to abridge the legacy; the father himself if he had survived the mother, could have taken no benefit of this legacy, but when he had so abridged it, the remainder of it would have fallen into the *residuum*? suppose the mother had appointed 500 l. to *Leonora*, or the testator had said in his will, if she marry without consent she should only have the interest of the 1500 l. for her life, *that* could not have taken place unless the principal had been devised over; it is said that by the words, "If any money shall be remaining in the hands of the said trustees", &c. is meant such sums as shall remain by reason of any granddaughter's marrying without consent; but that is not the meaning of them, for this being a devise to trustees of all the real and personal estate, it must

What will or will not amount to a devise over of a legacy.

2 Vern. 293, 294.

A devise of the residuum is not a devise over of a particular legacy.

mean the *residuum* of the personal estate, and the devise of the *residuum* has been determined not to be a devise over in cases of this kind; for where it is not expressly devised over, and is only to fall into the surplus, the daughter shall take it; perhaps this distinction may be thought very nice; I admit it to be so, but it is now an established rule that there must be an express bequest over of the particular legacy, and that a bare gift of the *residuum* will not be sufficient to deprive the daughter of the legacy, and there are many cases to prove this; the reason is, because when a testator makes one a residuary legatee, he has not that particular thing in his view or contemplation; indeed during the arguments in this case, I once thought that as the mother was made residuary legatee for life only, it might be considered as a legacy given over to the mother for her to dispose of at her pleasure, but it is plain that the power is given to the father and mother and the survivor, and therefore the father might have had the disposal or power of abridging it; so the plaintiffs are intitled to a decree under proper restrictions, for the legacy and interest since the marriage, but the defendant must be allowed for maintenance from *Leonora's* father's death, and the husband *Wheeler* must deliver proposals of a settlement to the master.

Moore *versus* Fernhaugh. B. R.

2 Stra. 1258.
S. C.
Court will not change the venue into next adjacent county to a Welch county.
2 Ld. Raym. 1418.

Nor into a northern county where assizes are but once a year.

MR. Ford moved to change the *venue* from *Middlesex* into the next adjacent county to the county of *Denbigh*; but it was denied *per curiam*, and they said it had been often denied; *Dennisson* Justice cited *Lloyd v. Williams*, Mich. 8 Geo. 2. in an action of assault and maihem, which he said he moved himself to change the *venue* to the next adjacent county to that county in *Wales* in which the cause of action arose; and the court then refused it, and cited *Howarth v. Williams*, where it was denied again. *Lee* Ch. J. I have known this done by consent but never without. *Vide Godfrey v. Filpot*, L. Ray. 1418. And N. The court will not change the *venue* into a northern county where the assizes are but once a year, if moved in *Michaelmas* or *Hilary* term, because of delay; and per *Wright* Justice, this was refused in *Nichols v. Bolster*.

Rex *versus* The Justices of Peace of Westmorland. B. R.

Mandamus to appoint overseers of the poor in a hamlet where there were never any before.

MR. Harrison moved for a *mandamus* to be directed to the justices to appoint overseers of the poor for the hamlet of *Nethergraveship*, *Watsfield* and *Churchfield*, (there never having been any overseers of the poor there before) upon the *stat. 13 & 14 Car. 2. c. 12. s. 31.* which gives power to appoint overseers (in large parishes) in particular hamlets, as the *stat. 43 Eliz.* does in parishes

at large; and it was granted upon an affidavit that there was poor belonging to this hamlet, which were chargeable to the hamlet of *Kirkland*, which could not remove them, because there were no overseers of *Nethergraveship*, &c.

Qui tam by the Town of Dover *versus* Hodgson. B. R.

UPON an information against the defendant for following a Defendant trade contrary to the the stat. of *Eliz.* the defendant had a removes an verdict, and obtained a sidebar rule for costs; and now it was mo- information ved to set the rule for costs aside, by Mr. *Smythe*, who insisted the from the ses- defendant was not intitled to costs, because he himself removed a verdict, he shall have his the information from the sessions; upon shewing cause by Serjeant costs. *Wynne*, the court seemed to think there could be no doubt but that the defendant must have his costs upon the *stat. 18 Eliz. c. 5.* but ordered precedents to be searched for in the crown-office.

Michaelmas Term

20 Geo. 2. 1746.

Rex *versus* Ingleton. B. R.

THE defendant was indicted for an attempt to commit fe- Where a de- lony, by attempting to set on fire the house of one *Eston* fendant who removes an indictment in- in *York*, and the indictment also charges that the defen- to B. R. by certiorari, and is convicted, set fire to the house; *Mason* and one *Glenton* informed the mayor of yet shall not pay costs on *York* of this, who bound *Mason* and *Glenton* over to prosecute the defendant. The defendant removed this indictment by *certiorari* stat. 5 & 6 W. & M. c. 11. into this court, and entered into a recognizance in the penalty of 20*l.* to the profe- to appear and plead to the indictment, and to prosecute it to be tried at her own expense, which she has accordingly done, and has been cutors. convicted and fined; and now it was moved by Mr. *Ford* that the recognizance might be discharged, she having paid the fine; this was opposed by Mr. *Henley* and *T. Robinson*, who insisted that by the *stat. 5 & 6 W. & M. c. 11.* the defendant was obliged to pay the prosecutor's

prosecutor's costs; but *per curiam*, this case is not within that act of parliament, for that extends only to officers and persons really injured, which neither *Glenton* nor *Mason* the prosecutors are in this case; for there was no damage done to the house, it was only intended to be done, nor are either of them officers, and therefore the rule was made absolute for discharging the recognizance by three Judges, *absente Foster* Justice, who was at *St. Margaret's Hill* trying the rebels.

Frammingham *versus* Brand. In Chancery.

The word *or* construed to be a copulative in a will.

THE question before Lord *Hardwicke* was upon these words in a will, (*viz.*) "I give and bequeath the inheritance in fee-simple of all my lands to *R. F.* my son, and to his heirs and assigns for ever, and in case the said *R. F.* my son happen to die in his minority, *or* unmarried, *or* without issue, then I give the inheritance in fee to *Henry Brand*". *R. F.* attained the age of twenty-one, but died unmarried and without issue. Lord Chancellor held that this contingent executory devise to *H. B.* could never take place, for both the words *or* are to be taken in a copulative sense, and unless *R. F.* had died in his minority *and* unmarried, *and* without issue, *H. B.* could never take; for if this was to be construed otherwise it might happen that *R. F.* might marry and die leaving issue in his minority, *which* would be disinherited if the estate was not to vest in him absolutely on his marriage, which could never be the intent of the testator; and the case of *Barker and Surtees* 2 Stra. 1175. *B. R. Mich.* 16 Geo. 2. was held to be good law, which was adjudged upon these words in a will, (*viz.*) I give the said premises to my grandson, his heirs and assigns, but in case he dies before he attains the age of twenty-one years, or marriage, and without issue, then he devised the same over to another person; the first devisee attained twenty-one, but died unmarried and without issue; and it was held *per totam curiam*, that by attaining the age of twenty-one, the estate became so absolute in the first devisee that the executory devise could never take effect, or vest; and *Dennis* Justice said he would consider it the same as if the testator had said, "If my grandson *A. B.* die under 21, and unmarried, and without issue", which he did not do, for he attained his age.

Wood *versus* Newton. B. R.

THIS is an action upon the case, wherein the plaintiff declares ^{Assumpsit.} upon an *indebitatus assumpsit* for 21 l. for the use and occupa- ^{The declara-} tion of land by the defendant, at his request and by the permission ^{tion is of} of the plaintiff, also upon a *quantum meruit* for the like; also upon ^{Easter term in} an *indebit' assumpsit* for 40 l. for divers cattle, goods, wares and mer- ^{the 18th year} chandizes sold and delivered, and also upon a *quantum valebant* for ^{of King} the like. ^{George the} ^{second.}

As to the promises and undertakings in the said declaration; ^{The plea of} 2dly, ^{the same term,} 3dly, and lastly abovementioned, and also as to the promise and ^{signed by} undertaking in the said declaration first mentioned, except as to ^{Poole.} 9 l. 2 s. 6 d. parcel of the said 21 l. contained in the said promise and undertaking in the said declaration first abovementioned, the defendant says, that he did not promise and undertake in manner and form as the plaintiff hath above complained against him, and thereupon issue is joined; and as to the said promise and undertaking in the said declaration first abovementioned as to the said 9 l. 2 s. 6 d. parcel of the said 21 l. therein contained, that the plaintiff ought not to have his action against him, because he says that after the making the said promise as to the said 9 l. 2 s. 6 d. and before the exhibiting ^{Tender before} of the said bill of the said plaintiff, that is to say, on the tenth of ^{exhibiting the} April 1745. at S. aforesaid, he the said defendant tendered and offered to pay to the said plaintiff 9 l. 2 s. 6 d. which the said plaintiff then and there refused to accept from the defendant, and the defendant further says that he always hath been and still is ready to pay the same, and brings the money into court ready to be paid to the plaintiff, if he will accept the same, and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his said action to recover any more damages than the said sum of 9 l. 2 s. 6 d. ^{bill.}

The plaintiff impails to the said plea until *Friday* next after the ^{Replication,} morrow of the holy *Trinity*, and then replies, and says that he ought ^{that plaintiff} not to be barred from having his action, &c. because he saith that the ^{sued out a} said plaintiff after the making of the said first promise in the said ^{latitat anterior} bill, and before the exhibiting the said bill of the said plaintiff, to ^{to the tender.} wit, on the 12th day of *February* in the 18th year of his present Majesty, prosecuted out of the King's Bench a writ of *latitat* (setting out the writ) which process he the said plaintiff prosecuted against the defendant with an intent to serve him personally with a copy thereof, according to the statute, and that the defendant might appear at the return of the said process in the said court at the suit of the said plaintiff, and that the said plaintiff might proceed there-
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upon and exhibit his said bill against the said defendant, and him might implead for recovering and obtaining, among other things, the said 9 l. 2 s. 6 d. according to the course and usage of the said court here; and the said plaintiff according to his said intention afterwards, to wit, in the said *Easter* term in the 18th year aforesaid, declared by his said bill against the said defendant in form aforesaid, for recovering and obtaining the said damages contained in the said bill; and the said plaintiff further says, that the said defendant at any time before the suing out and issuing of the said writ of the said Lord the King of *latitat* aforesaid, did not tender or offer to pay to the said plaintiff the said 9 l. 2 s. 6 d. in manner and form as the said defendant hath above in pleading alledged, and this the said plaintiff is ready to verify, wherefore he prays judgment and the damages which he hath sustained by reason of the non-payment of the said 9 l. 2 s. 6 d. parcel of the said 21 l. contained in the said first promise, to be adjudged to him, &c. *E. Bootle.*

Rejoinder, admits the cause of action accrued before the filing the bill, but denies that he made any promise before the *latitat* issued.

The defendant rejoins, and says that the plaintiff ought not to have his said action for the said 9 l. 2 s. 6 d. &c. because he says that it is true that he the said defendant did make such promise and undertaking as to the said 9 l. 2 s. 6 d. before the exhibiting the bill of the said plaintiff, as by the said bill is alledged; but the said defendant further says, that he the said defendant at any time before the suing out or issuing of the said writ of *latitat* abovementioned, did not promise and undertake to pay the said plaintiff the said 9 l. 2 s. 6 d. parcel of the said 21 l. &c. as the said plaintiff by his said plea above in reply pleaded hath above supposed; and of this he puts himself upon the country. *D. Poole.*

Demurrer.

Plaintiff imparls till *Wednesday* next after three weeks from the day of *St. Michael*, and then demurs generally; defendant joins in demurrer.

This case was solemnly argued last term by Serjeant *Bootle* for the plaintiff, and *Poole* for the defendant, and it was this term argued the second time by Sir *Thomas Bootle* for the plaintiff, and Mr. *Ford* for the defendant.

It was objected by the plaintiff that the rejoinder is bad, because a *latitat* may be tested before the cause of action accrued, and if it may, then the issue tendered by the rejoinder is immaterial. *Cra. Jac.* 561. 1 *Vent.* 28. Sir *Thomas Bootle* cited *Mathews v. Spicer* B. R. whereof he had the paper book then in his hand of *Pasch.* 12 *Geo.* 1. which was an action upon several promises; the defendant as to all except 4 l. 4 s. mentioned in the fifth promise pleaded the general issue, and as to that 4 l. 4 s. he pleaded that after the promise to pay that sum and before the time of filing the bill, viz. the

the 2d of *April*, he tendered the money. The plaintiff replied that before the filing the bill, *viz.* the 12th of *February*, he sued out a *latitat* with intention that the defendant might be served therewith and proceeded against him thereupon, and that the defendant did not tender before the suing out of the *latitat*; upon this the defendant did not rejoin to the fact, but demurred upon the replication; and the court were of opinion that the *latitat* might be sued out before the cause of action accrued; and cited the two cases above for that purpose; if therefore a *latitat* may be sued out before the cause of action arises, the issue tendered in this case is immaterial; and if the replication is ill, the defendant ought to have demurred to it, and not have rejoined to the country; and Sir *Thomas Bootle* relied upon this, that the defendant had tendered an immaterial issue, and therefore prayed judgment for the plaintiff. But notwithstanding this objection, judgment was given for the defendant, upon Mr. *Ford's* argument for him, which was as follows:.

Mr. *Ford* for the defendant: It is admitted upon this record first, that the defendant was always ready to pay the debt claimed by the plaintiff; there is no pretence of any demand or refusal, but on the contrary a constant readiness to pay is admitted.

2dly, It is admitted that at the time of suing out the *latitat* the plaintiff had no cause of action.

3dly, I do insist, and think it must be admitted to me in point of law, that if at the time of the commencement of a suit the plaintiff has no cause of action, a subsequent right of action will not support it, but the court *ex officio* ought to abate the writ.

It is objected for the plaintiff that the defendant's rejoinder is frivolous, that the existence of the cause of action before the suing out the *latitat* is immaterial, for that the *latitat* is only a summons to bring the defendant into court, is only process to compel an appearance, and that if a cause of action accrues in a vacation, the party may legally sue out process of a preceding term, so that it is of no consequence whether the plaintiff had any cause of action at the time of suing out the *latitat* or not, and for this purpose *Cro. Jac.* 561. is cited, which was an action for an escape upon a *latitat* tested the 29th of *June*, when the bond debt upon which the arrest was made, did not accrue until the 29th of *August* following; this was held right, for the *latitat* not being returnable till the term after the bond was given, that is sufficient to maintain the arrest, and the process sued out in the vacation always bears teste the preceding term; 1 *Vent.* 28. where it is held a *latitat* may be taken out, but a man cannot be arrested upon it before a debt is due; and this differs from an original writ, which if it bear teste before the money is due it is abateable,

abateable, but a *latitat* is not only to bring defendant *in custodiam*, that the plaintiff may declare against him, but that he may have bail, and after *that*, the proceedings upon the *latitat* cease; upon the authority of this case it must be admitted that either the rejoinder is good, or the replication is bad; and if the replication is good the rejoinder of consequence is good likewise; for considering the *latitat* as a summons only, that according to the course of the court it may bear *teste* of a term precedent to the cause of action, how then is a tender before the issuing of it material? can a man tender before the cause of action exists? this is impossible; suppose an issue had been taken of the fact alledged in the replication, that no tender had been made before the suing out the *latitat*; and suppose this had been found for the plaintiff, could such verdict have been material? the *latitat* might have issued before a tender could have been made, and therefore the finding there was no such tender, when it was impracticable to be made, would have been immaterial.

Upon considering the replication the court will take notice of the course and practice of issuing *latitats*, as well as in determining upon the rejoinder, and then taking the *latitat* only as a summons to enforce an appearance, it appears upon this record that the plaintiff hath no way defeated the force of the defendant's plea, but by shewing that though it is admitted a proper tender was made before the bill was filed, yet none was made before the *latitat* issued; or, in other words, that none was made before there was any debt due; how does this defeat the plea which alleges that the defendant made a tender before the bill was filed, and was always ready to pay the money from the time he owed it? If the plaintiff would consider the *latitat* as a summons, ought he not to have gone further in his replication, should he not have shewn the issuing the writ, and that no tender was made before the service of it? this was done in *Cro. Car. 264. Watts v. Baker*; it was trespass *quare clausum fregit*; the defendant pleaded a tender of amends: plaintiff replied a *latitat*, (as here,) and that the tender was made after the arrest upon it; and it was resolved that this tender came too late, for as well as a tender after an original writ comes too late, so after an arrest upon a *latitat*, for the tender of amends must be intended to be immediately after the trespass committed, and before any suit.

What then are the times when a tender comes too late? 1st, After the *teste* of an original; 2^{dly}, After the service of a *latitat*, for the *teste* of a *latitat* is insisted to be quite immaterial. How then is the plea answered? does the present replication shew that the tender came too late? does it prove that it was not made before the service? is that the commencement of the suit upon this sort of process? if it is, what can be inferred, or be tried by the replication as it stands?

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The business of a replication is either to deny the facts in the plea, or to confess and avoid them by some other facts, which, if found, shew that the allegations in the plea are nothing to the purpose; suppose the facts in the replication found with the plaintiff, would they have that effect? does it follow that because the tender alledged was not made before the *teste* of the *latitat*, that therefore it comes too late? it certainly does not, and therefore if no certain issue can be taken on the rejoinder because of the immateriality of the *teste*, neither can any be taken on the replication.

What matter
a replication
ought to con-
tain.

But supposing the replication be good, the rejoinder is a compleat answer to it.

First, the replication states a *latitat*, and concludes that no tender was made before the issuing of it; what is the answer? I admit there was no such tender, that fact is confessed, but this is the reason, at the time such writ issued, the plaintiff had no cause of action, and so no tender could be made; is not this an answer to the replication, and a material one too? the defendant thereby assigns a reason for not doing the thing which the plaintiff complains he ought to have done.

But 2dly, Supposing the replication be good, it can be only so upon this ground that the *latitat* is to be considered as an original and the foundation of the suit; in this light, and no other, the issuing the process is the commencement of the suit, and the plaintiff treats this *latitat* exactly in the same manner as if he had sued out an original, and on this ground it is that a *latitat* sued out and continued on the roll prevents the statute of limitations; from the time of the *teste* of a *latitat* when it is set forth in pleading the action is considered as subsisting, though it was never served as process, but only taken out with an intention of filing a bill; 1 Sid. 53, 60. and from that time all the books say that in the King's Bench the action is commenced; and in the case of *Culliford* and *Blandford*, where the question was, whether suing out a *latitat* within the year was the commencement of an action within the 31 Eliz. c. the words of the book are, "As to this question, three Judges held clearly that the suing out a *latitat* within the year was a sufficient commencement of the suit to save the limitation of time, because the *latitat* is the original of the King's Bench, and may be continued on record as an original writ;" and it has been adjudged that the suing out a *latitat* within the time, is sufficient to prevent the incurring the statute of limitations; and *Holt* Ch. Justice does not dispute the principle whether the suing out a *latitat* be the commencement of a civil action, or whether it is the original of the plaintiff's suit, but only distinguishes between *that* and a popular action, in which case he thought a bill ought to be filed on record; this case

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proves

proves plainly that the suing out a *latitat*, or the exhibiting the bill, may in this court be the commencement of an action; that it is in the plaintiff's election either to make one or the other the original; that from the time of issuing the *latitat*, where the plaintiff insists upon it the suit is as much subsisting as if commenced by an original; and if this be so, why is the rejoinder immaterial, if the replication be good? the plaintiff insists the action was commenced before any tender, he has alledged the *latitat* as the institution of his suit, relies upon the *teste* of it as the ground of his bill, as that point of time to which all the subsequent proceedings ought to have relation, and therefore why should it not abate the proceeding, if prosecuted before any cause of action? shall it have relation to support proceedings in order to save a debt and to do justice? shall it relate to deprive a man of the benefit of the statute for limiting of a popular action? shall it in the replication be a sufficient allegation of the commencement of a suit in order to avoid a legal tender, and yet not be a commencement of the suit to abate an unjust action; to say otherwise would be to make the *latitat* the commencement; and not the commencement of the suit on the same record. Upon this record it cannot be questioned but the insisting of the *latitat* is an unconscionable attempt to do injustice; it is a new experiment to involve honest men in difficulties, and to put them in the power of malicious creditors.

It was objected upon the first argument, that the defendant might have relieved himself by pleading that he had tendered before notice or service of the *latitat*. To this I answer, that if the suing out of a *latitat* in a civil action be the commencement of a suit, a tender subsequent though before notice would be to no purpose; the commencement of a suit is a demand of a debt, and a tender after a demand is of no use, that would be directly to contradict his plea, that says he was always ready. But supposing such an allegation should be received, why is the defendant to be put upon making it? the plaintiff, who insists upon a *latitat*, has it in his power to use it as he pleases, either in the nature of an original, or as a summons, to bring the party into court; if he chooses to consider it as an original, as the commencement of the suit, why should the defendant be obliged to treat it in a different light; why is the court to consider it in a different manner than the party desires, who sued it out.

By the rule of law every man's plea is to be taken most strongly against himself, and by this rule the suing out the *latitat* must be taken on this record to be the commencement of the action, as that which the plaintiff has elected and chosen to be such, and which the court cannot consider otherwise without making a construction on the rejoinder that oppugns the replication. But supposing such a
rejoinder

rejoinder would be bad, the *teste* and suing out the *latitat* is a matter of record; those records, all persons are bound to take notice of, and it should seem, that to say the tender was made before notice of the *latitat* would be wrong; and it may be compared to the case of an executor, who pleaded *plene administravit before notice*. Carter 227. *Meller v. Overton*; such plea is not good, but the defendant must plead *plene administravit ante diem impetrationis brevis originalis*. *Ward v. Dobson*, Hil. 2 G. 2. C. B. plea of *plene administravit before notice* held ill, for all may resort to records, and defendant should plead according to 3 Lev. 28. *Et quod ipse nulla habet bona vel catalla testatoris vel habuit die impetrationis brevis prædictæ vel unquam postea*. And though these cases are of original writs, yet the law must be the same of *latitats* whenever insisted on as the commencement of the suit; they are both equally of record and notorious to the world, and there cannot be any averment against one but what may be equally made against the other; and there can be no harm in considering the *latitat* in this light; if the plaintiff had any merits, instead of resorting to the *latitat* he might have replied a demand and refusal, and so falsified the plea of the defendant; therefore to conclude, that if the rejoinder be bad because it offers an issue of a fact depending on the issuing of a *latitat*, the replication is in like manner equally so, and then the plaintiff is guilty of the first fault; on the other hand, if the replication be right, the rejoinder is so likewise, as it only offers an issue on the same ground that the replication does, *viz.* that the suing out the *latitat* is the ground of the action.

Judgment of the court.

Lee Ch. Justice: In general the suing out a *latitat* is not material; and in the cases cited it is considered only as process to bring the party into court; but in the present case the plaintiff seems to aim at a surprise, and if this *latitat* is not to be considered in the nature of an original writ, what is it? when it is replied to the statute of limitations pleaded, or to avoid a tender, is it not the commencement of the suit? the defendant ought to have the same advantage of it as the plaintiff; so I think the *latitat* in this case is to be considered as an original writ, as the plaintiff himself in his replication has made it the commencement of his suit; and judgment must be for the defendant.

Wright Justice: If the *latitat* be considered only as process to bring the party into court, then the rejoinder would be bad, but the plaintiff in this case by his replication seems to me to have made it the commencement of his suit, and therefore I think it may be taken to be in nature of an original writ.

Dennison

Dennison Justice: The question is in this case, whether the tender comes too late; the defendant pleads he made it before the exhibiting the bill, and this is right; the plaintiff replies a *latitat*, and that the tender was not made before the suing out the *latitat*, rejoinder that there was no cause of action subsisting at the time of suing the *latitat*: to be sure a *latitat* is not strictly an original, but it may be considered as the commencement of the suit; so it is when pleaded to the statute of limitations, &c. I have some doubt whether the plaintiff's replication be good, because it is not material when the process issued; I speak this upon a supposition that the *latitat* is only process, and in this light the plaintiff seems to insist upon it; I think it may be considered in the nature of an original, being the commencement of the suit, and so the rejoinder is good.

Foster Justice of the same opinion.

Judgment for the defendant *per tot' cur'*.

Goodright, of the demise of the issue of Matthew Hall,
versus Jacob Hall. In ejectment. B. R.

Devise.

THIS was a case reserved for the opinion of the court upon the words of a will. *Jacob Hall* the testator having two sons *Matthew* and *Jacob*, devised his lands to *Matthew* in fee, "Provided nevertheless that if *Matthew* shall die before me, then I do constitute and appoint by these presents my son *Jacob Hall* to enjoy the estate in the same manner as *Matthew* should have done, and also in case the said *Matthew* shall happen to die before the said *Jacob Hall*, he the said *Jacob Hall junior*, shall have and enjoy the estate as *Matthew* should have done."

Matthew survived the testator, leaving issue the lessor of the plaintiff, and living *Jacob* the defendant and brother of *Matthew*.

This case was twice argued at the bar; and it was contended for the defendant that (by the words, "And also in case the said *Matthew* shall die before the said *Jacob Hall*, he the said *Jacob Hall junior*, shall have and enjoy the estate as *Matthew* should have done;") the defendant was intitled to the lands; but *per curiam*, the name *Jacob Hall* without the addition of *junior*, must plainly mean the testator, and the testator begins his will thus, "I *Jacob Hall*, &c." Judgment for the plaintiff.

Aubeer, trustee of the Marquis of Powis, *versus* Barker
in custody of the Marshal. B. R.

It was moved on behalf of the plaintiff to amend his declaration, by adding two counts; this application to the court was made after the term next after the term in which the declaration was delivered, and after the defendant had pleaded thereto.

Amendment.
The court will not give leave to amend a declaration after the term next after the term in which it was delivered.

Wright Justice, (*absente* Lee C. J.) I take it to be the rule of the court, that a count cannot be added after two terms, and the term in which the declaration is delivered is always included; as to the case of the *Dutchess of Marlborough v. Widmore*, Hil. 4 Geo. 2. in B. R. the amendment in that case was allowed on a particular reason, for if it had not been there allowed, the action would have been lost by the running of the statute of limitations. *Dennison* and *Foster* Justice of the same opinion; and so the rule to shew cause why the amendment should not be made was discharged: but N. B. Another reason for discharging the rule was, because the defendant was in actual custody; and this was the third term he had been so; and this would be making a new declaration to keep him in prison so much the longer.

Langstaff *versus* Rain & Ux'. B. R.

SIR Thomas Bootle moved to discharge the wife out of custody; this was an action of assault and battery done by the defendant's wife, wherein there was a verdict and judgment for the plaintiff, and both the husband and wife were taken in execution: But *per curiam*, this matter has been determined that the wife is liable to be taken in the case of *Finch & Ux' versus Dudding & Ux'* in Mich. term 19 Geo. 2. and they now refused to discharge the wife.

Husband and wife both taken in execution in an action for the assault done by the wife. 2 Stra. 1237.

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The King *versus* Charles Ratcliffe, Esq; November
21, 1746.Foster 40.
S. C.

A person convicted of high treason in the year 1716. brought in by habeas corpus, and the record of conviction being read, he is asked what he has to say why execution should not be awarded. He pleads he is not the same person convicted, issue is joined and found against him, and execution is awarded.

THIS day a *certiorari* being returned before the court of B. R. of the record of the conviction and attainder of one Charles Ratcliffe in the year 1716. for committing high treason (in levying war against his late Majesty King George the first in the year 1715.) before commissioners appointed for that purpose at the Old Bailey was read by the clerk of the crown; and also an *habeas corpus* directed to the constable of the Tower of London with the return thereof, which was a commitment of the prisoner then brought thereby to the bar (supposing him to be the same Charles Ratcliffe convicted as above) by the Duke of Newcastle, secretary of state, for the said crime of high treason, was also read; whereupon the person then at the bar supposed to be the same Charles Ratcliffe who was convicted in the year 1716. was asked by the secondary of the clerk of the crown to hold up his hand, (which he refused to do) and what he had to say why execution should not be awarded by the court, and done upon him according to the said judgment; the Attorney General Ryder having first prayed on the part of the crown that execution might be awarded against him.

Mr. Ford and Mr. Joddrel were assigned by the court of counsel with the prisoner at his request, and prayed time to consider what to plead and to rely upon, and desired to have a copy of the record and to see it: but *per curiam*, there is no instance or precedent for it, so refused it; but at their request the court ordered the same to be read over again by the clerk.

Per curiam, It is reasonable that counsel should have time to be instructed, but the crown must not be delayed, so take time till Monday next.

Ford for the prisoner: I desire it may not be understood that we shall be then ready to go to trial, but if we can give any good reason for putting it off, we shall be at liberty to do it; to which the court and the Attorney General conceded, so the prisoner was remanded, and ordered to be brought again to the bar on Monday the 24th of November, which he accordingly was; and being asked what he had to say why execution should not be awarded against him upon the said record of conviction, he pleaded *ore tenus* that he was not the identical Charles Ratcliffe named in the record; the Attorney General *ore tenus* then replied that he was, and thereupon issue was immediately joined *ore tenus*; whereupon it was moved by the counsel for the prisoner, that a reasonable time might be allowed to him to prepare for his defence upon an affidavit made,

that two persons who were beyond seas, one of them at *Brussels* and the other at *St. Germans*, were material witnesses for him, as he believed, without whose testimony he could not safely proceed to make his defence, and that they will attend the trial, if a reasonable time be allowed for that purpose.

It was first objected to this by the Attorney General, that there was no title to the affidavit; that it ought to have been intitled *Between the King and Charles Ratcliffe*, whereupon the affidavit was altered, but yet not intitled, as it was objected it ought to have been: the alteration only was *Le Count de Derwentwater* maketh oath, that *A.* and *B.* now residing at such places abroad are material witnesses for this deponent in the trial of the issue joined between the King and this deponent, the prisoner at the bar, without whose testimony he cannot safely make his defence upon the said issue, and though the name of the cause was not written at the top of this affidavit, this was *prima facie* well enough to have it read; after it was read the King's counsel objected that it was not sufficient to put off the trial of this issue, which was only of a collateral fact, and according to all the precedents in the books such issues had always been tried *instantèr* as soon as joined; but they said, that if the prisoner at the bar would swear that he was not the very identical person named in the said record of conviction, and who was tried and convicted in the year 1716, *that* might be a reason for the court to give him a longer time to prepare for his defence, as it was a matter which was wholly in his own knowledge, and if true, he might safely swear he was not that same *Charles Ratcliffe* mentioned in the said record of conviction, but the prisoner (after a long argument for him that he was not obliged by law to swear to his plea,) refusing to swear that he was not the same identical person who was convicted in the year 1716. the court immediately * swore a jury to try the fact (which jury was ready waiting in the hall in order to try any issue that might be joined between the King and the prisoner).

The two first witnesses called for the King, deposed that they knew *Charles Ratcliffe* in the year 1715. and that he was brother to the late Earl of *Derwentwater*, that they saw him in rebellion at *Hexham* in arms, that he had another brother *Francis*, who died before the rebellion in 1715. but these two witnesses said they had never seen the said *Charles Ratcliffe* since they saw him at *Hexham*, until about a month now past, when they saw him at the *Tower of London*, and that the person at the bar was the very same identical *Charles Ratcliffe*; but *N. B.* I did not hear these two witnesses, or either of them, swear that they or either of them saw the prisoner tried and convicted in the year 1716.

1 Sid. 72.
Rex v. Corbet & al'.
Keil. 13.
1 Lev. 62.

* So it was done in the King and Roger Johnson in B. R. Mich. 2 Geo. 2. N. B. Mr. Ratcliffe challenged the first juryman called, and insisted on his right to a peremptory challenge, but was overruled per cur', and so has been the modern practice. See S. P. C. 163. Co. Lit. 157. 2 Hale 267. 1 Lev. 62. A 1 Keb. 244.

A third witness was called by the King's counsel to prove the same thing, and although he swore he used to have *that Charles Ratcliffe*, who was convicted in the year 1716. in *Newgate*, yet he now swore that he did not believe the prisoner at the bar to be the same person, and rather thought he was not *that person*.

The fourth and last witness for the crown was *Williamson* the lieutenant of the *Tower*, who swore that since the prisoner at the bar had been now lately in the *Tower*, he had declared he was the Earl of *Derwentwater*, and that he the prisoner had told him in what manner he made his escape out of the *Tower* in the year 1716.

Besides this evidence, two acts of parliament were read which mention the attainder of the late Earl of *Derwentwater* and the said *Charles Ratcliffe*, and some others of that family; this was the whole of the evidence for the King.

Then the counsel for the prisoner observed upon the evidence that the two witnesses who had sworn positively might be mistaken in the person of the prisoner, as they had not seen *Charles Ratcliffe*, whom they saw at *Hexham*, for 30 years together, and this might the rather be supposed because the third witness had refused even to swear that he believed the person at the bar to be the same *Charles Ratcliffe*, though he said he knew *the Charles Ratcliffe*, brother of the late Earl of *Derwentwater*; that none of the witnesses had proved that the prisoner at the bar was the same *Charles Ratcliffe* who was tried, or saw him tried and convicted in the year 1716.

After this the jury retired from the bar, and in half an hour brought in their verdict that the prisoner at the bar was the very same *Charles Ratcliffe* who was convicted of high treason in the year 1716. mentioned in the said record: whereupon Mr. *Ford* for the prisoner moved that he might have leave to plead an act of oblivion or general pardon of the third year of the late King; but *per* three Judges it cannot now be done, for the defendant has been asked what he had to say, &c. and he has relied upon his not being the same person mentioned in the record, and this plea comes too late, he having made his election what to rely upon, and the court cannot ask him twice what he has to say why execution should not be awarded against him, whereupon the court awarded execution, and this day fortnight was appointed by the court for that purpose at the prayer of the Attorney General.

N. The prisoner insisted he was an officer in the *French King's* army, and offered his commission, but the court refused to read it; he also insisted on a cartel between the two crowns now at war, but the court said they could take no notice of either.

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N. The court said where any exception is in an act of pardon it must be pleaded specially, or they could take no notice of it.

N. The prisoner refused to hold up his hand, and did not do it.

Memorandum, The prisoner was beheaded on *Little Tower-hill* the 8th of *December* 1746. about one at noon, and behaved with great fortitude and christian patience, *ut audiui*.

Smith and Sibson. B. R.

THIS was an action of trespass, assault and false imprisonment, upon the general issue Not guilty, there was a verdict for the plaintiff at *Carlisle*, subject to the opinion of the court upon the following case:

An information was made before justices of peace upon oath against the plaintiff *Smith* for harbouring run goods contrary to the statute of *Geo. 1.* that the justices did adjudge that *Smith* did harbour such run goods, *viz.* Brandy, &c. and according to the power given them by the statute, condemned him in the penalty of 13 *l.* and made out a warrant of distress to levy the same on his goods; and upon the back of the first adjudication by way of indorsement there was a further adjudication that the said *Smith* should pay (besides the said 13 *l.*) 5 *s.* 4 *d.* to the officers for their costs and charges, which was also put on the back of the warrant, which was directed to the defendant and the gaoler; they returned upon the warrant that the plaintiff had no goods whereupon the money could be levied, so the justices made out another warrant directed to the defendant who was a constable, and to the gaoler, to take the body of the plaintiff, and to convey the same to the county gaol, and there to deliver him to the keeper thereof, thereby requiring the said keeper to take him into his custody, and to detain him until he paid the sum of 13 *l.* It is further stated in this case, that upon this warrant the defendant attached the plaintiff, whereupon the plaintiff tendered and offered to pay him 13 *l.* which the defendant refused to accept, and refused to release the plaintiff out of custody unless he would pay the further sum of 5 *s.* 4 *d.* for costs, which the plaintiff refused to do, thereupon the defendant carried him towards the county gaol the next day, but before they got to the gaol, they were overtaken upon the road by one *Daniel Wilson*, who paid the 13 *l.* and 5 *s.* 4 *d.* for which a receipt was given to the plaintiff, and then he was discharged out of custody and not carried to gaol.

Imprisonment. One condemned by justices of peace in the penalty of 13 *l.* for harbouring run goods, is attached by their warrant till he pay the same, he offers to pay 13 *l.* but the officer detains him till he pays 5 *s.* 4 *d.* more for costs, this is false imprisonment.

Mr. *Henley* for the defendant objected, that although the justices had no power to adjudge, nor the officers any right to take any thing

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for costs, yet that trespass and imprisonment was not the proper action in this case, but that wherever any man demands and receives more money than he ought to do, an action for money received to the use of the plaintiff is the proper action.

2dly, He objected that the defendant had no authority to receive any money, but was only to carry the plaintiff to prison, and that the receiving of this money was an indulgence to the plaintiff; as in the case of a *cap. ad satisfaciendum*, in strictness the sheriff is to take the body, and to have him before the King at *Westminster*, and has no authority to receive any money; and the act of parliament in this case directs that the money shall be paid to the sheriff.

Mr. Crowle for the plaintiff; the defendant has abused the authority given him by the warrant, which was only to take and detain the plaintiff until he paid the 13*l.* after plaintiff offered to pay the 13*l.* the detainer was illegal, for the warrant says nothing of the 5*s.* 4*d.* neither have the justices power to give any costs; Mr. Henley seems to admit that an action for money received would lie, which is an admission that the money was unlawfully received, and if so, it was false imprisonment to detain him after he offered to pay the 13*l.* and of that opinion was the whole court, and the *postea* was delivered to the plaintiff.

In answer to what was said that the defendant had no power to take the money, and to what was said about a *ca. sa.* Mr. Justice *Dennison* said, that as to this he would give no opinion, but that it seemed very hard to him that when the warrant in this case, or upon a *ca. sa.* is only for raising the money, it would be very hard to carry a man to gaol after he offered to pay it, and said he thought that if a defendant taken by a *ca. sa.* offered to pay the money, and the sheriff refused to take it and still detained him, it would be false imprisonment, which was not denied by the rest of the court.

Wood *versus* Wenman. B. R.

Practice.

Hab. corpus
to remove a
cause brought
Nov. 6. De-
claration Nov.
12. defendant
not intitled to
an impar-
lance.

THIS was an action originally brought in the court of the sheriffs of *London*, which was removed by *habeas corpus* in B. R. the 6th day of *November*; upon the 12th of *November* the plaintiff delivered a declaration, and gave a rule to plead, and now Sir *John Strange* for the defendant moved for an imparlance, and insisted the practice was the same as if the action was originally commenced in this court; and cited *Salk. 515.* but *per curiam*, We will not put the plaintiff in a worse condition than he was in the court below, and therefore refused to grant an imparlance; so Sir *John* took nothing by his motion.

Adams *versus* Sparry. B. R.

THIS was an action commenced by bill, wherein the plaintiff having proceeded to final judgment, sued out a *fieri facias* returnable on *Monday* next after three weeks from the day of *St. Michael*, which was the effoin-day and the 20th of *November*, for *Michaelmas* day happened upon a *Monday*, and the full term began upon *Thursday* 23d of *November*; *Per curiam*, There is no such return in this term in suits by bill as *Monday* next after three weeks from the day of *St. Michael*, so the execution is void, and the goods taken thereby and in the sheriff's hands must be restored to the defendant. Sir *John Strange* for the defendant, Sir *Richard Lloyd* for the plaintiff.

An execution set aside because returnable on the effoin day in a suit by bill.

Ryall, Knt. and others, assignees of *Harvest* a bankrupt, *versus* *Larkin*. B. R.

ACTION on *assumpsit*, that defendant was indebted to *William Harvest* and *Jonathan Stevens* deceased, whom the said *William Harvest* survived, in 20 *l.* for goods sold and delivered by the said *William Harvest* and *Stevens* in his life-time, and before the said *William Harvest* became a bankrupt, to the said *William Larkin*, quantum valebant for other goods, and an *in simul computasset* with *Harvest* and *Stevens* in his life-time, whereupon defendant was found in arrear 13 *l.* 5 *s.* 6 *d.* and being so found in arrear promised payment, and concludes that the defendant hath not paid the said *Harvest* and *Stevens* in the life-time of the said *Stevens*, and before the said *Harvest* became a bankrupt, or to the said *Stevens* in his life-time since the said *Harvest* became a bankrupt, or to the said plaintiffs, the assignees, since the death of the said *Stevens*, to the damage of the said assignees of 20 *l.*

The statute for setting off one debt against another does not extend to assignees under a commission of bankrupt.

Defendant pleads *non assumpsit*, and thereupon issue is joined; and further the defendant by leave of the court says, that the said assignees ought not to have or maintain their said action against him the said defendant, because he the said defendant says that the said *William Harvest* before he became a bankrupt, that is to say, on the 21st day of *April* 1740. at *Westminster* in the county aforesaid, by his certain writing obligatory called a bond, sealed with the seal of the said *William Harvest*, and shewn to the court of the said Lord the King now here, the date whereof is the day and year last mentioned, acknowledged himself to be held and firmly bound to the said *William*

Plea a set off of a bond.

William Larkin in 100*l.* of lawful money of *Great Britain*, to be paid to the said *William Larkin*, when he should be thereunto required; and the said *William Larkin* in fact saith, that there is now due and owing to him the said *William Larkin* from the said *William Harvest*, upon account of the said writing obligatory, for principal and interest the sum of 64*l.* of lawful money of *Great Britain*, to wit, at *Westminster* aforesaid, in the county aforesaid, which said sum of 64*l.* by the said *William Harvest* owing as aforesaid, exceeds the money from the said *William Larkin* due to the said assignees of the said *William Harvest* as aforesaid, to wit, the sum of 13*l.* 5*s.* 6*d.* by occasion of the promises mentioned in the said declaration, namely at *Westminster* aforesaid, and out of which said sum of 64*l.* he the said *William Larkin* is willing and offers to pay the said assignees the whole of the said money due to them as assignees aforesaid, by reason of the premisses according to the form of the statute in such case made and provided; and this he is ready to verify; wherefore he prays judgment if the said assignees ought to have or maintain their said action thereupon against him, &c. to this the plaintiff demurred generally, and the defendant joined in demurrer.

This case was argued by Serjeant *Bootle* for the plaintiffs, and by Mr. *Lawson* for the defendant. For the plaintiffs it was insisted, that the act of parliament for setting off one debt against another did not extend to assignees under a commission of bankrupt, and that in the present case there was not mutual debts, for wherever there are mutual debts there must be mutual remedies, and the defendant could have no action on his bond against the plaintiffs; and of this opinion was the court, and gave judgment for the plaintiff.

Hilary Term

20 Geo. 2. 1746.

Dominus Rex *versus* Kinlock. B. R.

THE defendant was arraigned for committing high treason, being in the late rebellion, and pleaded Not guilty, and the jury were sworn, and his trial just coming on, the defendant insisted he was a subject of the King of *France*, and that he was advised to plead to the jurisdiction of the court, which he was now too late to do (having already pleaded in chief) without the consent of the Attorney General, who with great fairness and candour consented that the prisoner might withdraw his plea and plead to the jurisdiction of the court, and that a juror might be withdrawn and the jury dismissed, which was accordingly done; the Attorney demurred, and upon arguing this matter, the plea to the jurisdiction was over-ruled; whereupon the prisoner was a second time arraigned, and pleaded Not guilty, and another jury was sworn and brought him in guilty; and now in arrest of judgment the question was, whether a prisoner could be twice arraigned and a second jury sworn to try him; and by the opinion of nine judges against Mr. Justice *Wright* at *St. Margaret's Hill*, it was held that he was legally tried and convicted, for the first jury was withdrawn at his own prayer and by his own consent; but *Wright* argued *totis viribus* against it, and insisted strongly that no man can be put twice upon the trial of his life for one and the same crime, not even by his own consent. N. B. Upon the report of this matter to the King, his Majesty was graciously pleased to pardon *Kinlock*, *ut audivi*.

A traitor was arraigned twice, and two juries sworn to try him. See Mr. Justice Foster's report of this case 16, 23.

Thornton *qui tam versus* Gibson. B. R.

THIS was an action *qui tam* for killing hares, in which there were seven counts laid; the defendant pleaded the general issue last term, and now Mr. *Fawkes* moved to withdraw the general issue and to pay 5*l.* into court, and have it struck out of the declaration; Money not allowed to be paid into court after plea pleaded.

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ration; *sed per curiam*, This would be to overturn the practice of the court, which never gives leave to pay money into court after a plea pleaded; and discharged the rule to shew cause; Mr. Clayton for the plaintiff.

Easter Term

20 Geo. 2. 1747.

Between the Parish of Austwick and the Parish of Clapham in Yorkshire. B. R.

Settlement of poor.

A parish apprentice may be turned over from A. to B. and from B. to C. and shall gain a settlement where he served the last forty days.

MICHAEL Wilson a poor boy, with the assent of two justices, was bound apprentice to Thomas Jackson of Austwick, who was tenant to Thomas Jackson, clerk of Clapham, who had agreed to indemnify T. Jackson of Austwick, who sent the pauper the next day to Mr. Jackson of Clapham, with whom he stayed about seven or eight weeks, and attended his sheep, and then ran away to his mother, whereupon Mr. J. of Clapham agreed the pauper should stay with his mother, and that he would pay her for the boy's board and cloaths, which he did for between two and three years; afterwards Mr. Jackson of Clapham agreed with the boy's brother, who was a mason, and lived at Austwick, that the boy should serve him for the remainder of the time in the indenture, accordingly the boy did serve his brother the mason at Austwick the remainder of the time.

By the order of two justices, which was confirmed by the sessions, the boy was removed to Clapham; and now Mr. Clayton, on behalf of the parish of Austwick, came to shew cause why both the orders should not be quashed, and objected, that although one master might consent that his apprentice might go to another master and serve out his time with him, yet that a *second* master could not turn him over to a *third*, as has been done here, for if so, the apprentice might be turned over to forty different masters; and therefore he said the pauper was well settled at Clapham, where his last legal service was.

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To this it was answered by Sir *John Strange* on the other side, and resolved by the court, that the statute which gives a settlement to a poor child who is bound by the parish, requires only that the apprentice shall be bound by indenture, and thereby he shall gain a settlement where he last served by such indenture for the space of forty days; and though strictly speaking, in point of law, an apprentice cannot be assigned, or turned over by one master to another except by custom, as in *London*, yet it has always been held, that if an apprentice with his own consent is turned over with his indenture from one to another, and serves the second master forty days, he gains a settlement where he last served; and *The King and East Bergholt, Trin. 13 Geo. 2.* was cited, where a *pauper* was bound to *A.* who turned him over to *B.* who turned him over to *C.* at *East B.* where he served the last forty days; the court were of opinion he gained a settlement at *East B.* and this is in the very point; so the orders of the justices and sessions were quashed, because the *pauper* gained a settlement at *Austwick*, where he served the last forty days.

Spelman, Esq; a Barrister *versus* — B. R.

THE defendant moved to change the *venue* from *Middlesex* into *Hertfordshire* upon the common affidavit, and obtained a rule for that purpose; and now the plaintiff came and moved to discharge the rule, insisting upon his privilege of laying his action in *Middlesex* where the court of *B. R.* (where he attends) sits; and *per curiam*, The rule to change the *venue* must be discharged.

Venue.

A barrister has the privilege of laying the *venue* in *Middlesex* although the cause of action arise in another county.

Elton and Elton & al'. In Chancery.

SIR *Abraham Elton* by his will dated 26 Oct. 1727. devised in these words: "Item, whereas I have a right and power to dispose of the sum of 1500 *l.* being part of the money settled upon my late deceased daughter *Elizabeth*, the late wife of *Peter Day*, Esq; and which sum is now in his hands; now I do hereby give and bequeath the same, and all my right and interest therein, unto my granddaughter *Anna Elton*, the daughter of my son *Jacob Elton*, to be at her own disposal, pursuant to the request of my said late deceased daughter *Elizabeth Day*, in case she marries with the consent and approbation of my said son *Jacob Elton* and his wife, and in case of their deaths before that time, then with the consent and approbation of their trustees, and not otherwise."

A legacy

given to a granddaughter in case she marry with consent, &c. she dies unmarried, the legacy never vested.

Anna

Anna Elton the legatee survived the testator, but died at fourteen years of age, and unmarried.

The question in this cause was, whether the legacy of 1500*l.* ever vested in *Anna Elton*; for if it did, it shall go to the plaintiff her father, who is her administrator; if it did not vest, then it will sink in the residue of the personal estate of the testator, and the defendants who are assignees under a commission of bankrupt of the present Sir *Abraham Elton* the testator's grandson, (who was residuary legatee of *Dame Elton*, who was residuary legatee of the testator,) will be intitled to it.

It was insisted by Mr. *Attorney General* on behalf of the plaintiff, that the legacy vested by the first part of the clause, and that the words annexed to it, "*In case she marries with the consent and approbation of my said son, &c.*" made a condition subsequent, which, by the act of God intervening, could never be performed, so that the legacy, which was once vested, could not be taken out of the legatee by the act of God.

On the other side it was contended that this legacy never vested at all, and so it was decreed.

Lord *Hardwicke*: I am of opinion that this is a condition precedent, but whether it be considered as a condition precedent or subsequent, *that* will make no difference in this case, for as money legacies are always determined in this court according to the rules laid down by the ecclesiastical courts, which hold all conditions void, which are annexed to legacies in restraint of marriage, it makes no difference whether this be a condition precedent or subsequent in respect to the legatee's marrying with or without consent; the marriage is the event which must happen before the legacy could vest, and I am of opinion if the legatee had married without the consent required, that this court ought and would have decreed the legacy to have been vested, as the same was not given over to any other person.

Suppose the legatee had brought her bill to have been paid this money, the court could not have decreed it to have been paid to her, because it is given to her upon an event (*viz.* her marriage) which never happened.

The rule of the civil law in this matter is "*Dies incertus facit conditionem;*" the uncertainty of the time, or whether the event will ever happen, upon which event it is to be paid or given, is the reason that has always guided in similar cases to this, and if the event does never happen, the legacy never vests.

I am also of opinion that the legatee in this case, being a *grand-child*, could not have had the interest of the legacy ordered to be paid to her for maintenance; but if it had been in the case of a *father* and *daughter*, and no other provision had been made for her, this court would have given her the interest.

If a legacy be given to a person to be paid at the age of twenty-one, though the legatee dies before that time, the legacy vests, and shall go to the legatee's representative, because the time is certain when the legatee would have been of *that* age if he had lived; but whether a single woman will ever marry or not, is wholly uncertain, therefore if the legacy be given upon her marriage, it can never vest until that event (which the testator had in view) happen.

The words, "*And not otherwise*," are very strong, and relate to the whole clause, and are as much as if he had said, "I do not give it her unless she marry with consent, &c." however she might have taken it, notwithstanding these words, if she had married even without consent.

In the case of *Atkins* and *Hiccocks*, (in which I took time to consider and look into all the books and cases upon this head, both in the civil and common law,) the case was, a father, by his will, gave to his daughter 200 *l.* to be paid her at the time of her marriage, provided she married with consent, &c. the legatee died unmarried after the testator, and in that case I decreed that the legacy never vested; this is a stronger case than that at the bar, as being in the case of a *father* and *daughter*, for it is a debt of nature due from the *father* that he shall make a provision for his own *child*, but the debt is not so much due from the *grandfire* to the *grand-child*; and there is a great difference, for if a *copyhold* estate is devised to a *child*, and *no surrender* be made in the testator's life-time to the use of his will, this court will supply the want of a *surrender*; but if such *surrender* be wanting in the case of a devise of a *copyhold* by a *grandfire* to a *grandchild*, this court will not supply such defect, because the *grandchild* may be provided for by its own immediate parents, as was determined *inter Kettle* and *Townsend*.

In the case of a devise to a daughter of a copyhold, the court will supply the want of a surrender to the use of the will, but not in the case of the like devise to a grandchild.

If a legacy be given at twenty-one or day of marriage with consent, if the legatee live till 21, and afterwards marry without consent, yet she shall have it, though it be given over if she married without consent.

It is plain the testator intended to give this 1500 *l.* to prefer his *grandaughter* in marriage, and it is very common for testators to make different provisions for their *daughters* or *grandaughters* in respect to their marrying and not marrying.

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As to the words, "*To be at her own disposal*," those may as well mean that it should be to her own separate use when she marries, as any thing else; but there is no occasion to make any construction as to *disposal* one way or other, for the legacy never vested, because the legatee never was married.

The bill was dismissed without costs, as it was only brought to have the opinion of the court.

N. Mr. *Brown* for the defendant in the case of *Garbut v. Hilton*, at the Rolls, 26 Nov. 1739. the testator by his will in 1736. gave plaintiff 200 l. provided she married with the consent of her father and mother, or the survivor of them; plaintiff brought her bill to have the legacy raised and paid to her, and the question debated was, whether she must not be married before she was intitled to have the 200 l. and the Master of the Rolls was clearly of opinion there must be a marriage first.

Said *per Lord Hardwicke*, that the book of *Reports of Cases in Equity in Lord Nottingham's time* was of no authority.

Fogoe versus Gale. B. R.

After the venue is changed upon the common affidavit, the court will not alter it again upon an affidavit that the witnesses live in Scotland, and will not come so far as London, but are willing to come to Carlisle.

THE defendant having obtained a rule for changing the venue from *Cumberland* to *London*, upon the common affidavit that the plaintiff's cause of action, if he had any, arose in *London*, and not in *Cumberland*, or elsewhere out of *London*; it was now moved by Mr. *Poole* on the behalf of the plaintiff, that this rule might be discharged upon an affidavit that this was an action founded upon a promise made by the defendant to the plaintiff to indemnify him from any damages which might happen to him by reason of the plaintiff's agent or correspondent at *Glasgow* becoming bail or caution for the defendant in the *Admiralty court* there; that the defendant's witnesses lived in *Scotland*, and were willing to come to *Carlisle*, (to give evidence) but no further; and that as there was no process to oblige these witnesses to come to *London*, *Poole* prayed the action might be laid in *Cumberland*, as the next *English* county to *Scotland*. But *per curiam*, This was denied, for here is the common affidavit, and we cannot depart from the practice, which is the law of the court, and, as such, is the law of the land, and the plaintiff took nothing by the motion. *Ford pro def.*

Rex *versus* Hunter. B. R.

JUDGMENT was regularly signed in this (*being a criminal*) A regular judgment in a crown cause cannot be set aside on payment of costs. cause, and it was moved by Mr. Crowle and Mr. Ford for the defendant, to set it aside upon payment of costs, pleading the general issue, and taking short notice of trial, as is often done in civil suits; but denied *per curiam*, for it never was done.

Howell qui tam, &c. *versus* James. B. R.

THIS is a rule to shew cause why the plaintiff should not have leave to amend his information against the defendant for killing a hare, by altering the parish where the same is laid to be done. Mr. Evans on shewing cause objected, that there might be a conviction before the justices for the same fact already, in the parish where the informer wants to lay it; but it was answered by Mr. Phillips for the plaintiff, nothing of *that* appears to the court, and it is now three months since the fact was done, and if we cannot amend it the defendant will escape the prosecution; and this is like the case of the *Dutchess of Marlborough v. Whitmore*, where the court allowed the plaintiff to amend in an extraordinary case, which if the court had not done, the statute of limitations would have run, and the plaintiff have lost all remedy. And the rule now was made absolute to amend the information.

Trinity

Trinity Term

21 Geo. 2. 1747.

Rex *versus* Harvey. B. R.

Every law
made intro-
ducing a ca-
pital punish-
ment must be
construed
strictly.

IN the last term the defendant was brought to the bar by an *habeas corpus*, the return whereof sets forth, that he was committed as a felon convict upon the late *stat. 19 Geo. 2.* for not surrendring himself within forty days after publication in the *Gazette*, of an order by the King in council for him to surrender upon a charge of being armed on the sea-coast in order to be aiding and assisting in running of goods.

A suggestion of all the facts and requisites in the act of parliament was entred upon the roll by way of *dat' cur' intelligi*, &c. to which the defendant pleaded by denying all the facts therein alledged, and the *Attorney General* (then present) joined issue; and the prisoner was then remanded, and was ordered to be tried the first *Monday* in this term.

The defendant being now upon his trial, insisted that among other provisions the statute requires the sheriff to proclaim the order of council in two market towns *near* the place where the offence was committed; that it appeared upon the record that the proclamation was made at *Hadleigh* 42 miles distant from it, at *Ipswich* 30 miles distant, and at *Lestoff* 6 miles distant; and it was proved that there were five other market towns at 6, 8 and 14 miles distant from the place where the offence was committed, and so the defendant objected that the order had not been proclaimed at the market towns *near* the place, and therefore insisted he was not legally convicted. In answer to *this* it was proved that *Hadleigh* was a town in the same parish where the defendant resided, and therefore the *King's counsel* said the proclamation made there was more advantageous to the defendant, and that the statute ought to have a liberal construction as to this fact, which was only to give notice to the party to appear. But *per curiam*, The letter of this penal law ought to be complied with, and no proclamation can be allowed which is not warranted by the statute, as the present seems (to us) not

not to be; for there can be no rule more certain than that every law introducing a capital punishment ought to be construed strictly.

Thrale *versus* Cornwall. B. R.

ACTION of *debt* for rent brought by the assignee of the lessor against the lessee in the county of *Middlesex*, of lands in *Sur-* Debt for rent by the assignee of the lessor is local, but covenant is transitory. Vide 3 Rep. 23, 24. 2 Lev. Hob. 37. Cro. Car. 183.
ry; upon demurrer it was objected for the defendant, that an action of debt in this case is at the common law, which always annexes the rent to the reversion, is always local, and must be laid in the county where the land is; and the distinction is between *debt* and *covenant*, for *covenant* being founded on the privity of contract, is transitory; at common law covenant did not lie for the assignee of the reversion against the lessee, but is given by the *stat. 32 Hen. 8. c. 34*. And so it was held *per curiam*, who said that 1 *Saund.* 237, 238. where the difference was taken, has always been holden for good law. And judgment was given for the defendant.

Hawes and Hawes. In Chancery.

LORD *Hardwicke* Chancellor: There are two questions made in this cause, 1st, The first arises upon the words of the will of the grandfather *Andrew Hawes*, which are, "I give and devise all my estate in D. unto my four children A. B. C. and D. (who were his younger children) their heirs and assigns for ever, equally to be divided between them share and share alike, as tenants in common, and not as jointenants, with benefit of survivorship." The question is, whether the four children take as tenants in common generally, or as tenants in common with some sort of benefit of survivorship? What words in a will make a tenancy in common, and yet there shall be a survivorship if any of the devisees die under age. 1 Wms. 96. Stringer v. Phillips at the Rolls 1730. cited in 1 Wms. 96.
It is true that, in this court, *jointenancies* are not favoured, because they are a kind of estates that do not make provision for posterity, neither do I take it that courts of law do at this day favour them; although Lord *Coke* says that *jointenancy* is favoured because the law is against the division of tenures, but as tenures are many of them taken away, and in a great measure abolished, that reason ceases, and courts of law incline the same way with this court. Another rule is, that where there are contradictory words in a will, the court makes a reasonable and uniform construction, and will reject such words as are absurd and contradictory to the intent of the testator. Eq. Ca. Abr. 292. 2 Vern. 559. Prec. in Canc. Salk. 226. Popham and Bampfild, 2 Ro. Ab. 90. P. 5. 2 Wms. 20, 54. Cro. Eliz. 695. Ca. in Queen Anne's time 108. of no authority.

The words, "Equally to be divided" in a will, make a tenancy in common; here is also added, *As tenants in common and not as jointenants*," which are very strong words; but then it is also said

faid “ *with benefit of survivorship*, which last words create the difficulty in the case, that is to say, to know at what time the testator intended this benefit of *survivorship* should take place; and this may be explained by another part of his will, where he plainly points out a *survivorship* among the children themselves as to his personal estate, where the words are, “ *If any of my younger children die under age and unmarried, then I direct that the share of him so dying shall go to the survivors;*” then he comes to this devise of his real estate to his said four younger children, but it is true he does not say with *like* benefit of *survivorship*; I think it is natural to consider this as a fund or provision for these four children, and that he meant, if any of them should die before 21 or unmarried, that the share of the child so dying should go among the other children; and I am of opinion that C. dying under age, his share did survive to the other three, and shall not go to his heir at law.

The second question arises upon the words of the will of the father *Harwood Hawes*, wherein he devises all his estate to Mr. *Sheafe* in fee, upon trust that he, his heirs and assigns, shall sell and dispose of it, or of so much thereof as is necessary, and raise money to pay his debts; “ *And the residue of my estate which shall remain unfold, I direct my said trustee to convey to my three children A. B. and C. and their heirs, as tenants in common, and to the survivor and survivors of them and their heirs, when he, she or they shall attain their age of 21. and the rents and profits in the mean time to be paid towards their education;*” one of the children died under 21 and unmarried; the question is, whether this estate vested immediately upon the death of the testator, or not till they would respectively attain the age of 21. and whether they are to take in common?

Indeed when the trustee comes to convey, he must convey to each a divided share, as they would then take as tenants in common; but notwithstanding this, I am of opinion that if any of them die one day under age, the share of such child must survive; for I consider this as one fund for the provision of all the *three*, and it is the same thing as if the testator had said, “ *I direct the rents and profits shall be paid towards maintenance of my three children during their minority, and that my trustee do convey equally to them when they respectively are of age.*”

It was objected at the bar, that if *one* of the children had died under age, and the survivors had been minors, what must have become of that third part if it could not descend to the heir at law? I answer, it was one fund or provision for all the *three*, and that *third* of the profits must have gone to the survivors; none of them before he or she should become of full age could have called upon the trustee

trustee to convey. In the present case, one of them died under age, and the other two are now of full age, therefore the conveyance must be of a moiety to each of them; and decreed accordingly.

Finch and Wilson an attorney of C. B. In Error.

WILSON sued Finch in C. B. by an attachment of privilege, and in Michaelmas term 17 Geo. 2. declared that Finch was attached by writ of privilege, &c. to answer him in an *assumpsit* upon a promissory note; Finch pleaded *non assumpsit* & *non assumpsit infra sex annos*; issue was joined upon the first plea; and to the second plea Wilson replied that he sued out a writ of privilege the 7th day of July in the 16th year of his present Majesty, and that the said Finch did make such promise within six years next before the suing forth the said writ of privilege; to this replication there was a demurrer, and joinder in demurrer; there was a verdict for Wilson the plaintiff below upon the issue to the country.

An attachment of privilege in the Common Pleas is in the nature of an original writ, and when it is replied to save the statute of limitations, it is sufficient to shew the teste of it without continuances till the declaration.

The demurrer was argued twice in the Common Pleas, where it was objected to the replication, that it did not appear *thereby*, when the attachment was returnable, nor that it was ever delivered to the sheriff or returned, and that four terms intervened between the *teste* thereof and the term the declaration was of, and therefore there ought to have been continuances of this writ of privilege; but the court of Common Pleas were of opinion that an appearance to process cures all errors and defects therein, and gave judgment for the plaintiff below.

A writ of error was brought upon this judgment, and the general errors were assigned; and in Hilary term 18 Geo. 2. this matter was argued by serjeant Bootle for the plaintiff in error, and serjeant Draper for the defendant; and again in Michaelmas term 20 Geo. 2. by Sir Thomas Bootle for the plaintiff in error, and Mr. Poole for the defendant.

It was insisted that the judgment was erroneous, for that there are five terms between the *teste* of the writ and the defendant's appearance; and that in *mesne process* to attach the body, the writ at furthest must be returnable the next term after the *teste* thereof, or if a term intervene between, it is void; and the reason is, because the party may not be unlawfully hurt by a long imprisonment; there is a difference between *mesne process* and *executions*. 2 *Ld. Raym.* 775. And where a writ is a nullity, it shall not prevent the statute of limitations from running. 2 *Ld. Raym.* 772. 1 *Salk.* 421. S. C. The plaintiff below has gone five terms back, and by the same rule he may go back five years, which would wholly destroy the law as to returning and continuing of process.

3 *Keb.* 608.
1 *Lutw.* 256,
279.
1 *Ld. Ray.*
432.
Carth. 144.
Salk. 427.
Farrell. 5.

For

Shower 166,
366.

For the defendant in error it was argued, that an attachment of privilege in the *C. B.* is in nature of an original writ, and if an original writ is replied to the plea of the statute of limitations, it is sufficient to shew the *teste* of it when it issued without any continuances, according to the case of *Whitehead and Buckland*, *Styl.* 373, 401. but if a *latitat* or a common *clausum fregit* be replied, it must be shewn that it was continued properly to make it the foundation of the suit. *Carth.* 234. and of that opinion was the court, after time taken to consider; and the judgment was affirmed.

Elliot, Executor of Taylor, who was the second husband of Elizabeth, who was one of the daughters of John Boover a freeman of London, Plaintiff, *versus* Benjamin Collier and Mary his wife, who was the other daughter of John Boover, Defendants.

The husband's right of administration to his wife is transmissible to his representative, and shall not go to her's.

THIS was a bill in Chancery brought by the plaintiff to have an account of *John Boover's* personal estate, and to be paid the orphanage share thereof which *Elizabeth* was intitled to, wherein it was insisted by the plaintiff, that as *J. Boover* died leaving no wife, but only two daughters, that *Elizabeth* was intitled by the custom of *London* to a moiety of one half of *Jo. Boover's* personal estate, for by the custom of *London* a freeman leaving children only, has power by will to dispose of no more than one half of his personal estate.

The defendants by their answer insisted that *J. Boover*, about 24 years ago, gave *Elizabeth* away in marriage to her first husband *Thomas Filmore*, presented to her a gold watch, and fitted her out very well in cloaths; they also insisted (and attempted to prove by a hearsay of the father) that he gave her 100 *l.* and that this was an advancement in marriage, and that as the very exact portion did not appear under the hand of the father, *Elizabeth* was barred of her orphanage share; that the first husband of *Elizabeth* became insolvent, and her father took her home again to his own house, where she lived for some time and took care of his family, then *Filmore* her first husband died, and her father made his will, wherein he expressed himself, that if *Elizabeth* should insist upon her orphanage share, that she should pay 25 *l. per ann.* for her board. Then *Elizabeth* married *Taylor* her second husband; soon after *J. Boover* the freeman died, afterward *Elizabeth* died, and eight days after her death *Taylor* her second husband died, not having taken out administration to her; and now *Elliot*, as executor of *Taylor*, brings this bill.

Lord

Lord *Hardwicke*: There are two questions made in this case; First question.
 1st, Whether as *Taylor* never took out administration to *Elizabeth*
 his wife, her orphanage share ever vested in him, so as to be trans-
 missible to his executor the plaintiff?

2^d, Whether *Elizabeth* has been so advanced by her father in Second ques-
 marriage as to be barred of her orphanage share? tion.

As to the first, The spiritual courts are bound to grant admini- As to the first.
 stration to the next of kin; the husband is next of kin to his wife,
 and *Taylor* surviving his wife was well intitled to all her personal
 estate, and though he did not take administration, yet the right to
 her orphanage share vested in him, and is transmissible to his exe-
 cutor or administrator. The husband is not mentioned in the *stat.*
of Car. 2. of distributions, his surviving his wife is not a provision
 within that statute; no person but the husband can be intitled to
 the personal estate of the wife, unless by some agreement; so he
 might have had administration, and the whole would have been his
 own, no body could have shared with him; indeed there are several
 cases wherein the spiritual court is obliged to grant administration
 under the *stat. Ed. 3.* and yet such administrator is only a trustee. If the hus-
 If the wife in this case had survived her husband, every part of the band does not
 personal estate of her father which she had been intitled to, would reduce the
 have gone to her next of kin, except only such part thereof as the wife's right
 husband, while married to her, had reduced into possession; but into possession,
 notwithstanding this, there are many cases in this court where the and she sur-
 right to the personal estate of an intestate does not follow the right vives and then
 of administration. dies, her re-
presentatives
shall have it.

As to the second question, I am of opinion that this is not an As to the se-
 advancement of *Elizabeth* in marriage, and that she is not barred of cond.
 her orphanage share; for suppose her father had given her the 100*l.*
 yet as it appears in the cause his whole personal estate amounted to
 2000*l.* this could not be deemed an advancement in marriage; be-
 sides, it appears in the cause she was violently in love with her first
 husband, and her father must either have consented to *that* match
 or have buried her, so it is plain the father did not prefer her in
 marriage; so there must be a decree for the plaintiff, that an ac-
 count may be taken of the personal estate, and after allowing to the
 defendants what the master shall think reasonable for *Elizabeth's*
 board while she was with her father, that the rest of the orphanage
 share of *Elizabeth* be paid to the plaintiff.

Quære, the case of *Hole* and *Doleman* at *Doctors Commons* in
Michaelmas term 1736. cited by the Solicitor General, who said he
 was of counsel in it, and that it was therein determined by the
 Judge and all the Doctors (not in the cause) that the husband's
 right

right of administration to his wife is not transmissible to his representative, but that it goes to the next of kin to the wife. *Vide Lewin v. ——— Eccles and Freeman, Stanhope and Stanhope.*

The Vicar of Kellington in Yorkshire *versus* The Master and Fellows of Trinity College in Cambridge, Rectors, their Lessee, and two occupiers of lands in the parish. In the Exchequer.

Survey of a religious house taken in 1563. allowed good evidence to prove a vicar's right to small tithes.

LORD Chief Baron *Parker*: This is a bill brought by a vicar for the tithe of *agistment* of barren cattle, setting forth that he is intitled by endowment, prescription, usage or otherwise, to all *small tithes* within the parish; and, to make out his right thereto, produced in evidence an antient survey (from the first-fruits office) of the possessions belonging to the nunnery of *without* the walls of *York*, to which this rectory was appropriated, which survey was taken in the year 1563. upon the dissolution of monasteries *tempore H. 8.* whereby it appeared what species of tithes belonged to the *rector*, and what to the *vicar*, *viz.* corn, grain and hay to the *rector*, and to the *vicar* wool, lamb, and *all other small tithes*; also another survey taken by the college *anno 33 Eliz.* was produced, which agreed with the former. It was objected that it does not appear by what authority the survey in the year 1563 was taken; the answer is, that these surveys have always been allowed as proper evidence, and to be read, notwithstanding the commissions under which they were taken be lost; it has also been objected, and it appears in proof that *agistment* tithes have been paid to the *rector* for 50 years last past: In answer to this it is proved that before *that* time, *viz.* 60 years ago, this species of tithe was paid to two *vicars*; so that I am of opinion here has been an usurpation upon the *vicar* for 50 years last past. If an *endowment* appear, *that* is the rule we are to go by, if it do not, *usage* is the rule, therefore if there had not been this written evidence, (to be sure,) the payment to the *impropriator* for 50 years would have been very strong proof for him against the *vicar*; but on the other side here is a record which proves that the *vicar* is intitled to *all small tithes*, and at this day there is no doubt but that *agistment* tithe is a small tithe; and the court decreed in favour of the *vicar*.

Agistment is a small tithe.

Hay & Ux' *versus* Kitchen & Ux'. B. R.

ASSAULT and battery; defendants plead *son assault demesne*, tried before justice *Foster*; the defendant failed in proving his plea, then the plaintiff went on in his evidence and proved an assault made the 27th of *Octob.* and the *memorandum* in the record is of the first day of *Michaelmas* term, being the 23d of *Octob.* but the day of the assault laid in the declaration is the 19th of the same *October*. It was insisted at the trial that the plaintiff ought to be nonsuited, as not having proved any assault before the commencement of the suit; but the judge refused to call the plaintiff, and there was a verdict for the plaintiff, subject to the opinion of the court. The point was now spoke to, by serjeant *Poole* for the defendant, and Mr. *Bennè* for the plaintiff. *Per curiam*, The defendant by his plea admits an assault, which is laid before the day of the *memorandum*, and the plaintiff's proving an assault was unnecessary; if this had been upon the general issue, the court would have let the plaintiff have mended his bill by making a special *memorandum*; and this has been done where the day laid in the declaration was after the *memorandum* in *Bennet v. Mainwaring*, 7 & 8 Geo. 2. The *postea* was delivered to the plaintiff.

Assault and battery, son assault, &c. proof that the assault was on a day after the commencement of the suit.

Hooker Executrix *versus* Quilter. In Error. B. R.

ACTION upon the case upon four several promises: 1. An *indebitatus assumpsit* for the use and occupation of a house of the plaintiff's testator in his life-time, and the promise laid to be made to him; 2. A *quantum meruit* for the like; 3. An *indebitatus assumpsit* for the use of another house of the testator for the time incurred since his death, and the promise laid to be made to the plaintiff as executrix; 4. A *quantum meruit* for the use of another house of the plaintiff, without naming her executrix; judgment by *nil dicit* in C. B. writ of inquiry and intire damages assessed; now in error upon the common errors assigned, Mr. *Ford* for the plaintiff in error insisted that a man cannot sue as executor and in his own right in one and the same action; and that though this is a judgment by default, and not taken advantage of by demurrer, yet the court is obliged *ex officio* to abate the writ, for that the damages are intire, and the plaintiff cannot distinguish how much she is to have as executrix, and how much in her own right; and this being against a rule or maxim in law, is not helped by any of the statutes of *recofailes*.

Executrix sues for a debt due as executrix, and in proprio jure, the writ shall abate.

2 Stra. 1271. S. C.

Mr.

Mr. *Comyns* for the defendant in error insisted, that although this might have been ill upon a demurrer, yet it is not so upon a judgment by default; and cited 2 *Lev.* 110. and 1 *Sid.* 218. to shew the court will go as far as possible to support a judgment; he also urged that the court would presume the fourth count to be brought by the plaintiff as executor, as she was named such in the beginning of the declaration; and cited 1 *Ld. Raym.* to shew that the court have presumed against the very words of a record, where it is said, "money received for the use of the defendant, instead of the plaintiff."

Lee Chief Justice: It is not disputed but that a plaintiff in a declaration cannot make a demand for any thing due *jure alterius* & *in proprio jure*; and so is the case of *Rogers v. Cooke*, *Carth.* 235. *Salk.* 10. S. C. there was not in *that* case any demurrer (for *Salk.* in *that* is wrong) but the defendant pleaded a frivolous plea, when the court saw the record they abated the writ, because there appeared two incompatible demands in one and the same suit; and the true reason was on account of the damages which were intire, and the court could not say what damages the plaintiff was to have as *administrator*, and what *in proprio jure*; and this is a declaration against a rule of law, and is not helped by any statute; neither do I think a verdict would have helped it, for a verdict only helps upon a supposition the matter was proved before the judge who tried the cause; and supposing all the matter in this declaration to have been proved, yet the two demands cannot be made in one action.

Wright J. spoke to the same effect.

Dennison J. No doubt but this would have been bad upon a demurrer; and I think it is also bad upon a judgment by default, but am in doubt whether it might not have been helped after a verdict, because when an executor sues and declares for rent both in the lifetime of the testator and after his death, *there* the executor may sue without naming himself executor; and if he names himself executor it is surplusage, and he shall pay costs where it is for rent in his own time as executor.

Foster J. If the plaintiff's naming herself executrix in the beginning of the declaration in this case does not extend to the fourth count, I think the declaration is bad, and concur with my brothers. Judgment reversed.

Keeling *versus* Newton. B. R.

THE declaration was left in the office *de bene esse*, upon pro-
 cess returnable the *second return*, with notice indorsed upon
 it to appear and plead in eight days; and the like notice was given
 to the defendant that the declaration was left *de bene esse* as afore-
 said; the defendant's attorney filed common bail in due time, and
 tendered the general issue with a notice of a *set off*, which the
 plaintiff's attorney refused to accept, because the defendant's attorney
 had not taken the declaration out of the office and paid for it, and
 signed judgment, which was held to be regular *per totam curiam*,
 upon the Master's report, and upon consulting the clerks of the
 papers and others. *Vide Reg. Cur. anno 1700.*

Practice.
 Defendant
 must take the
 declaration
 out of the
 office and pay
 for it, before
 the plaintiff's
 attorney is
 obliged to re-
 ceive his plea.

Hallett *versus* Hallett. B. R.

RULE to shew cause why the plaintiff should not have leave to
 amend his declaration upon payment of costs, by altering the
 word *Middlesex* in the margin and putting in there the word *Dor-*
setshire, and by striking out the word *Dorchester* throughout and in-
 serting the word *Westminster* instead thereof. Mr. Lacy for the de-
 fendant said he had pleaded, and this was a motion in effect to
 change the *venue* by the plaintiff after plea pleaded, and was of the
 first impression.

Motion by
 the plaintiff to
 amend his de-
 claration by
 changing the
 venue after
 plea pleaded.

Mr. Burton *è contra*: This is an action upon a note, the defen-
 dant has pleaded a *tender* as to part, and *non assumpsit* to the rest;
 and if the amendment be made, the defendant need not plead *de*
novo. 2 Keb. 154.

The court inclined to make the rule absolute, but took time to
 consider.

Y y

Michaelmas

Michaelmas Term

21 Geo. 2. 1747.

Brown *versus* Best. B. R.

Special action
for diverting a
watercourse.

THIS is a special action upon the case for diverting a watercourse, wherein the plaintiff declares upon his own possession of the place through which the water used to run, and sets out the course thereof, and that the defendant has made this obstruction, *viz.* that he has digged two pits deep and wide, and made two ponds partly in and near the said course, and diverted the water into these pits, and made dams and banks to the ponds, by which the water has been diverted in its antient course, and a great part of it sunk into these pits and ponds, so that little or no water has come to the plaintiff's grounds, whereby the plaintiff is damaged.

If one has an-
tiently pits
which are re-
plenished by a
rivulet, he
may cleanse
them, but
cannot change
or enlarge
them.

The defendant pleads that all the water springs in his ground, and that the two pits have been there time out of mind for the use of water for the meadows and cattle, and that at the time when, &c. these pits were choaked up with mud, and therefore he dug two large pits, and made dams and banks, which he insists it is lawful for him to do, and denies that any other water has been obstructed.

The plaintiff replies, protesting that the plea amounts to the general issue, and says that the defendant did this of his own wrong, and concludes with an averment; the defendant demurs, and plaintiff joins in demurrer. This case was argued in *Trin.* term 19 & 20 Geo. 2. by Mr. Cox for the defendant, and Mr. Poole for the plaintiff. And in this term the court gave judgment.

Lee Chief Justice: I am of opinion that the declaration is very good, and that in the case of a watercourse which is *jure natura*, this is the best way of declaring, for the plaintiff being possessed of the place, declares that the water *currebat* through that place time out of mind, and that the defendant has obstructed it; and I think the defendant by his plea has not at all denied the plaintiff's having

having such a watercourse, but says that it took its rise in his the defendant's ground, that the water runs through part of his ground, that there were two pits immemorially, and acknowledges he has enlarged the pits and made the obstruction laid in the declaration; this really amounts to a confession of the plaintiff's action, for although there has been pits in the defendant's ground time out of mind, yet he cannot enlarge them, but they must remain as they always have been, and so is the rule both in the common and civil law. *Hetley 34. Duncomb v. Sir Ed. Randall. Dig. lib. 3. sec. 15.* The defendant indeed might have cleaned the pits, keeping them as they were before, but cannot enlarge them; if I have a right from usage as *currere solebat*, I have the right in such a manner as the usage has been; as to inconvenience to defendant it is nothing, and might be alledged in every such case as this; and the maxim in *Carth. 116. Poph. 166.* *Hetley 34.* is exactly applicable to the present case, *Sic utere tuo ut ne lædas alieno.*

Dennison Justice: Whatever the precedents may be in regard to watercourses to mills, yet as to natural watercourses this is the most proper way of declaring; as to the plea, it seems to be calculated not to come to the merits, for I cannot see it was possible for the plaintiff to take any issue upon this plea, though I cannot properly call it a prescription, yet it has the same effect, for these pits, &c. are said to have been time out of mind. Defendant says that altho' there was a watercourse through your land, yet in my land there have been two large pits for watering cattle, &c. and for other purposes for the occupation of my land; the defendant ought to have said for what purposes; there is a direct allegation that these pits have been time out of mind, and that all the water except what was stopped for his purposes, was not hindered, so that really he has in effect alledged a right to keep all the water if he pleases; and this plea can only amount to the general issue, for if it had appeared upon the general issue that the defendant had a right to keep all the water, the plaintiff must have been nonsuited; besides, the defendant admits he has enlarged these pits, which is certainly contrary to law, and if the defendant has any prescription, he ought to have traversed the plaintiff's prescription, according to the case of *Murgatroyd v. Law, Carth. 116.* And a watercourse is a quite distinct thing from the land. *Poph. 166. Wright and Foster Justices,* of the same opinion. Judgment for the plaintiff.

Denn

Denn of the demise of Warren *versus* Fearnside. B. R.

Habendum
from the day
of the date, of
an estate for
three lives, is
a freehold to
commence in
futuro, so is
void.
3 Salk. 625.

He who en-
ters under a
void lease and
pays rent is
not a disseisor,
but tenant at
will.

Tenant at will
has no estate
that he can
forfeit for
treason.

Lease to a
papist.
Q Whether
void.

Possession of
tenant at will
is the posses-
sion of the
lessor.

Stat. 11 & 12
W. 3. c. 4.

EJECTMENT. Special verdict finds that *Dorothy Talbot* being seised of the lands in question in fee, by lease and release in 1678. in consideration of a marriage to be had between her and *Edward Warren*, conveyed the same to trustees to the use of herself for life, then to *Edward Warren* for life, remainder to the heirs of her body begotten by *Edward Warren*, remainder to *Edward Warren* in fee, with power to *Edward*, if he survived his intended wife, to make leases for 21 years, or for three lives in possession, and not in reversion; the marriage took effect, and they had issue three sons *John*, *Edward*, and *Talbot*; *Edward* the father survived his wife, and in 1704. demised the premises in question to *John Plessington* for three lives, *habendum* from the day of the date thereof at the usual rent of 17 s. 2 d. which lease was executed in the presence of two witnesses according to the power, by virtue whereof *Plessington* entred and was seised, and continued so to be seised thereof, and paid rent in the year 1715. till he was attainted of treason, having been in the rebellion, and that he was a papist at the time of the demise and at the time of his attainder; that *Plessington* was indicted and outlawed for high treason in 1716. and was thereupon attainted; that *Edward Warren* the father died in 1718. that *John Warren* his eldest son died in 1729. without issue; that *Edward Warren* the second son died in 1737. and left issue *George Warren*, the lessor of the plaintiff, who is the heir at law in tail; that no claim was made of the premises by any of the family of *E. Warren* before the commissioners of forfeited estates, by the *stat. 1 Geo. 1. c. 50.* under which the defendant claims; and whether upon the whole matter, &c.

This special verdict was argued by Mr. *Starkey* for the plaintiff, and Mr. *Ford* for the defendant, in Michaelmas term 18 Geo. 2. and several other times by other learned counsel at the bar; and now the court gave judgment for the lessor of the plaintiff.

And 1st, It was resolved by the whole court, that the demise to *Plessington* being *habendum* from the day of the date, was of a freehold to commence in futuro, and therefore void. 2^{dly}, That *Plessington* entring and enjoying the premises under this void lease was not a disseisor, but a mere tenant at will, for it is found he paid rent. 3^{dly}, That a tenant at will has no estate that he can forfeit to the crown, for he has nothing at his own disposal, and the act of treason determined his tenancy at will. 4^{thly}, That the lease to *Plessington* was also void for another reason, (was held by all except Justice *Foster*), viz. because he was a papist. 5^{thly}, It was resolved

that the possession of *Plessington* (the lease being void) was the possession of *Warren*, so that as the estate was never out of the possession of the family of *Edward Warren*, there was no occasion to make any claim before the commissioners under the *stat. 1 Geo. 1. c. 50.*

Foster Justice dissented, as to the lease being void, the lessee being a papist; he said the words *void, &c.* in the corporation act, are considered only as voidable; so in the case of a purchase by a villain, he may take for the benefit of his lord, and he thought that a papist might take for the benefit of the crown in case he should commit treason; but as to all the other points he agreed with the rest of the court, and that judgment should be for the plaintiff.

Law qui tam, &c. *versus* Worrall. B. R.

INFORMATION on the *stat. 8 Geo. 1.* for killing game; the defendant pleaded a conviction before a justice of peace for the same fact, and the defendant had judgment for want of a replication, and obtained a *sidebar-rule* for costs, which *Mr. Evans* now moved to set aside, alledging that the *statute* did not give the defendant costs, and that the *stat. 18 Eliz.* does not extend to the subsequent statutes. But *per cur'*, The words of the *stat. 18 Eliz. c. 5.* are as general as any *statute* relating to costs, and seem to extend to every informer upon any *penal statute* who shall delay his suit, discontinue, be nonsuit, or shall have the matter pass against him by verdict or judgment, such informer shall pay costs; and there have been a great number of cases like *this*, where costs have been given; and cited *Carter qui tam v. Tooting, Mic. 12 Geo. 1.*

Costs for the defendant, for want of a replication, on an information for killing game.

Jeffereys versus Walter. B. R.

RULE for the plaintiff to shew cause why the defendant should not have leave to withdraw his plea of *non est factum* to a bond, and to plead the *statute of gaming*, upon payment of costs, taking short notice of trial, and giving judgment of this term in case there be a verdict for the plaintiff, grounded upon an affidavit that instructions had been given by the defendant to his attorney to insist upon the *statute of gaming*; and the attorney apprehending that he could give that *statute* in evidence on *non est factum*, did not plead the *statute* specially. It was objected for the plaintiff that this had never been done, that the defendant had been guilty of an affected delay by exhibiting a bill in Chancery against the plaintiff for a discovery, relief, and an injunction, to which he had put in his answer; that the defendant first pleaded *nil debet*, which

Leave given to withdraw *non est factum* to a bond, and to plead the statute of gaming.

Post. Taylor v. Joddrell.

he would not stand by, and then pleaded *non est factum*, and an injunction with liberty to proceed to judgment was granted in Chancery.

Per curiam, (absente Cap. Justic') The court will not give leave to withdraw the general issue and plead specially where it is to the prejudice of the plaintiff, or where there has been an affected delay; in this case it appears by the answer in Chancery that the defendant has a good defence at law, and here is no affected delay; in the case of *Malters and Shelmandine*, Mic. 15 Geo. 2. leave was given to withdraw the general issue Not guilty, and plead a justification, upon the like terms as in the present case; and they said they remembered several other cases where the like had been done by the court; so the rule was made absolute.

Herring *versus* Durant. B. R.

Venue cannot be changed but into a county where the whole cause of action arose.

MR. Ford moved to change the *venue* from *London* into *Kent*, upon an affidavit that the cause of action arose upon a bridge called *King'sbridge*, partly in the county of *Kent* and partly in the county of the city of *Canterbury*, and not elsewhere: But *per curiam*, We cannot change the *venue* into another county, unless the cause of action wholly arose *there*; and he took nothing by his motion.

Sibthorpe *versus* Moxholme. In Chancery, Nov. 10.

BILL brought by the representative of *Richard Chillingworth* to have a bond for 500 *l.* delivered up to her.

Testatrix by will forgives her son-in-law a debt upon bond, and orders it to be delivered up, her son-in-law dies in her life-time, his representative shall have the bond delivered up.

The question in this case arises upon the will of the plaintiff's mother, by which she forgave her son-in-law *Richard Chillingworth* a debt due to her on bond for 500 *l.* and all interest that should be due thereon at the time of her decease, and desired her executrix to deliver up the same to be cancelled. The will was made in 1743. *Richard Chillingworth* died after the making thereof, and soon afterwards in 1744. the testatrix died, which is admitted by the answer; the question is, whether the debt was extinguished, or this is a lapsed legacy, *R. C.* dying in the life-time of the testatrix.

Lord Chancellor: I am of opinion that the plaintiff by some means or other ought to have the benefit of this devise, and the bond delivered up; this is the case of a mother making provision for several branches of her family, and if this part of her will cannot take effect, part of her family would be unprovided for, the daughter herself being the plaintiff in this cause. Although it must be

be admitted the bond would have been assets in the hands of the executor in respect to creditors, yet it does not follow that it should stand as to the executor, who is a volunteer. If the executor had brought an action at law, this court would have granted an injunction; and though this wants the form of a *release*, and cannot be pleaded as *such* at law, the *will* being no *deed*, yet as against the executor and volunteers, will be considered in this court to have the same effect; and in the last part of this devise there is nothing *personal*, the will only ordering the bond to be delivered up, not saying to *whom*; and it differs from the case in 1 *Wms.* 83. and 2 *Vern.* 521. Decreed the bond to be delivered up and cancelled.

Pinfent *versus* Pinfent & al'. In Chancery.

LORD Chancellor: This is a bill preferred by a son, who claims as remainder-man in tail, against his father who is tenant for life without impeachment of waste, and part of the relief prayed is, that the title deeds may be brought into court and deposited with the master for safe custody; this is a pretty extraordinary kind of relief that is prayed, I will not say it may not be proper in some cases, as where the father being tenant for life endeavours to better his estate, or to destroy the remainders; it may also be proper where the tenant for life was an entire stranger to the estate before the settlement thereof made, or in the case of a jointress; but I believe in those cases the masters will agree with me, that it would be much better and safer, if a third hand, who is a friend to the parties, could be found to deposit the deeds in; because when a master dies and another person comes in his place, deeds have been frequently lost; and this is the reason why I have always been cautious how I have decreed writings to be brought into court to be deposited for safe custody.

Bill by a son who is a remainder-man in tail against his father who is tenant for life, to have the title deeds deposited in court for safe custody. And also against trustees to oblige them to make such settlement as is directed by the plaintiff's grandfather's will. It appearing in the cause that the plaintiff has covenanted to grant annuities out of such lands as shall come to him after his father's death, those annuitants must be made parties.

This bill is also against trustees to oblige them to make such settlement as is directed by the plaintiff's grandfather's will; and it appearing in the cause that the plaintiff has covenanted with several persons to grant them annuities out of such lands as shall descend or come to him in case he shall survive his father, it was objected by the defendant's counsel that these annuitants ought to be before the court; and I think this is a material objection, for these covenants to grant annuities are equitable liens upon the lands, whereof the trustees now have notice; and if I should order the deeds to be brought into court, the same might afterwards, upon the motion of the father and son (when they may be better friends) be delivered to them out of court, and then they might join in selling the estate to a purchaser for a valuable consideration without notice of these annuitants, and the annuitants could have no remedy but by bringing

ing a bill against the trustees and the son ; so that by making such order or decree as is prayed, without hearing the annuitants, might possibly be doing them injustice, and therefore the cause must stand over, with leave to amend by adding all proper parties, and the defendants must be paid the costs of the day.

Hilary Term

21 Geo. 2. 1747.

Feathers *versus* Bryan. In Error. B. R.

Plaint levied in an inferior court before the cause of action accrued, is helped after a verdict.

THIS was an action upon the case upon a *quantum meruit* in the *Palace court*, wherein the plaintiff below declares, that in consideration he had permitted the defendant to enjoy such a messuage, being within the jurisdiction of the court for a long space of time, to wit, for the space of three quarters of a year, ending the 25th day of *March* last, he the defendant upon the 20th day of the same month of *March* at *Southwark* within the jurisdiction of the said court promised to the plaintiff to pay him so much money as he reasonably deserved to have for the same, &c. There was a verdict for *Bryan* the plaintiff below, and a writ of error being brought, it appears upon the transcript of the record that the plaint was levied at a court held upon the 10th of *March* last, which is before the three quarters of a year ended, for which time of enjoyment of the house the action is brought, and this is assigned for error.

Mr. *Ford* for the plaintiff in error : To shew that this was error, cited 1 *Ro. Abr.* 792. *pl.* 12. *Cro. Jac.* 69, 70. *Yelv.* 70. And said, this is not like the case where the day in the declaration appears to be before the cause of action, for though the day of the promise be laid to be made before the cause of action arose, yet it is not traversable.

Mr. *Bennè* for the defendant in error : This is after a verdict, and helped by the *stat.* 18 *Eliz.* c. 14. s. 1. which has been determined.

mined to extend to inferior courts, *Salk.* 266. and in the case of *Thayer or Sayer & Ux' v. Curtis*, *Hil.* 10 Geo. 2. *Rotulo* argued *Pasch.* 10 Geo. 2. being an action of *assault and battery* in the *palace court*; and upon error brought it appeared that the plaint was levied six or seven days before the day of the assault laid in the declaration; and *per totam curiam*, This being after a verdict is aided by the *stat.* 18 *Eliz.* and the court intended there was no plaint at all; and in *Pasch.* 9 Geo. 1. *C. B. rotulo* 57. *Waterton v. Plaxton*, which was an action of *assault and battery*, and upon error brought it appeared that the day in the declaration was after the *teste* of the original writ; this case was argued by Mr. *Fazakerley* and Mr. *Reeve*, and being after a verdict *per curiam*, was helped by the *stat.* 18 *Eliz.*

Mr. *Ford* in reply: The *stat.* 18 *Eliz.* only helps an *original*, which is bad for want of form, and the *total want* of an *original*, but does not help a *bad original in substance*, as *this* is.

Per curiam: There is no difference between this case and *that* of *Sayer and Curtis*, which we well remember; and the case in *Yelo*. is not like *this*, for *this* is a *quantum meruit*, that the plaintiff having permitted the defendant below to enjoy the messuage for a long time, *viz.* for the space of three quarters of a year, ended the 25th of *March*, &c. The plaintiff below was not obliged to prove the whole three quarters of a year's rent due, and for aught appears to us the jury may have found less, but if they have not, this is helped after a verdict. Judgment affirmed *per totam curiam*.

Dyke versus Sweeting. In Error. B. R.

THIS is an action of *covenant* in *C. B.* in which there is a *plea*, *replication*, *demurrer*, and *joinder in demurrer*, and the whole proceeding is entred upon record of *Trinity term*, in the 8th and 19th years of his present Majesty, with a continuance by *ur' advisare vult* until *Michaelmas term* following, when an *interlocutory judgment* is given for the plaintiff below, and a writ of *inquiry* of damages awarded, returnable in *Hilary term* following, and thereupon final judgment is entred of the same *Hilary term*. and upon error brought, the want of an *original* is assigned for error; *certiorari* is awarded to certify whether there be any original writ of the same term with the *placita*, *viz.* of *Trinity term*, 18 & 19 Geo. 2. and returned that there is no *original* writ in this cause; upon *diminution* alledged a second *certiorari* is awarded to search the records of *Hilary term* 19 Geo. 2. wherein final judgment is given, and an *original* writ is thereupon returned between the parties, *tested* the 23d day of *January*, returnable on the *octave* of the *purification of the blessed Mary* in that term.

An original writ of the term wherein final judgment is given, will not warrant that judgment if it appear upon the same record that there have been proceedings of a preceding term.

A a a

Serjeant

Serjeant Poole for the plaintiff in error: There is no *original writ* in this cause to warrant the proceedings of the court in the term whereof they appear to be recorded, and therefore this judgment is erroneous; and I rely upon 1 *Lew. 69. Anonym.* which is exactly like the present case.

Mr. Ford for the defendant in error: Although the final judgment and *original writ* be both of the same term, yet the court will infer that the original was prior, and in the case of a *warrant of attorney* filed of a subsequent term to the *placita*; the judgment is good though the *placita* be prior to the filing the *warrant of attorney*, as was held *inter Manning and Rook, Hil. 4 Geo. 2.* So also *inter Husk and Mingay.* And in *Trin. 11 & 12 Geo. 2. inter Phillips and Phillips*, the final judgment and *original writ* were both of the same term, and the judgment was signed before the *original* was returnable, and held to be good, although in strictness of law the court of Common Pleas is not possessed of the cause before the *original writ* be returnable, and if it be the ground and foundation of the action, it ought to be filed before any step or process at all can be made; yet it is well known this is but matter of form, and if an *original writ* be taken out at any time pending the suit it is sufficient, so that the King be paid his fine for it.

Lee Ch. Justice: The question is, whether this *original writ* which appears to be returnable in *Hilary term* warrants the final judgment of the same *Hilary term*, when at the same time it appears to the court there were proceedings in the same cause in *Trinity* and *Michaelmas terms* before?

Now it is certain that where the want of an *original writ* is assigned for error, and it appears that all the proceedings are of the same term wherein the *original* is returnable, such an *original* warrants those proceedings, let it be of any return in the same term; but an *original* of the term wherein final judgment is given will not warrant it, if by the record it appears that there has been proceedings in the cause in the term or terms before, according to 1 *Lew. 69.* And the case of *Dismo and Shirley, Yelv. 108.* goes upon the same distinction, that when all the proceedings are in one and the same term, an *original* of that term will warrant the same, but not otherwise; and 1 *Keb. 327.* Booth against Beard is directly in point; to be sure the *original writ* is the very foundation of the suit in the Common Pleas in strictness of law, though the practice has gone so far as to allow an *original* to be good of the same term with the final judgment, if all the proceedings be of that term.

The case of *original writs* differs from *warrants of attorney*, for it is sufficient if a *warrant of attorney* be filed at any time pending the suit, let it be in which term it will; the *stat. H. 8.* only requires a *warrant of attorney* to be filed in the cause; and the *stat. 4 Annæ* requires it to be filed according to the course of the court, and that is to have it filed at any time pending the cause, and it is no matter when, so that it be in the *same suit*; but as to an *original writ* it is otherwise, for if there be proceedings in the action in a term preceding the return thereof, the *original* will not support them. Wright J. of same opinion.

Dennison Justice: The *stat. 4 & 5 Annæ* extends to judgments by default, provided there be *warrants of attorney* and an *original writ*, according to the rules of law. In the *Common Pleas* formerly when the proceedings were of two terms they used two rolls, which they called the *imparlance roll* and the *plea roll*, but of later times they generally make up the whole record of *that term* wherein *issue* is joined, or *interlocutory judgment* is signed, without any *alias prout patet*, so that now there is seldom any *imparlance roll*; I am of the same opinion that there must be an *original* of the *same term* with the *placita*; the court were going to reverse the judgment, but upon the prayer of Mr. Ford for the defendant in error, the court gave him time to apply to get an *original writ* of *Trinity term* in which the *placita* was.

Rex *versus* Parish of Bugden. B. R.

JOHN Green and his wife came with a *certificate* from the parish of Royston to the parish of Amptbill, where they had a son Thomas born, who continued to live with his father till he was 21 years old, and then married Mary his wife at Amptbill, and became head of his own family, and lived separate from his father. John Green the father went from Amptbill to live in the parish of Bugden, where he hired a house of 10 l. per ann. and thereby gained a settlement at Bugden; Thomas Green the son, his wife and children, becoming chargeable at Amptbill, were, by order of two justices, which was confirmed by the sessions, removed to Bugden as the last place of the old man's legal settlement, he not having by any act of his own gained any settlement: But by the whole court, both orders were quashed, for where the son becomes independent of his father, as in this case, he shall not follow the father's last place of settlement, but shall be sent to Royston, where his father's settlement was at the time he separated from his father's house, and the son was never at Bugden with his father; the case of St. Michael's Norwich and St. Nicholas Ipswich, about twenty years ago, is the very same with this case, where there was the same determination, and

When the son of a certificate man becomes independent of his father, he shall not follow his father's last settlement that he gained by purchase, but shall be sent to the place from whence he came with his father by certificate.

and when the father gained a settlement at *Bugden* he gained it for himself and family, but *Thomas* the son was then no part of his family, so could have no settlement at *Bugden*.

Rex *versus* Inhabitants of *Silton*. B. R.

A son of a certificate man is bound out an apprentice, he thereby gains a settlement.

GILES *Milburn* and *Priscilla* his wife were certificated by the parish of *Silton* to *Wincanton*, and there they had a son born *John*, whom the parish of *Silton* bound out apprentice to a taylor in the parish of *Horsington* for eight years, which he served, and afterwards married and went to live at *Wincanton*, where he and his family became chargeable, and by an order of two justices confirmed by the sessions was removed to *Silton*, the place of his father's certificate, the sessions being of opinion that he had not gained a settlement at *Horsington*, because the statute says a certificate person can only gain a settlement by purchase or serving an annual office: But the court quashed both the orders, because when the parish of *Silton* had bound the son apprentice in *Horsington* they had provided for him, and his service gained him a settlement *there*, and he was no longer any part of his father's family after he was bound, and *Horsington* was the last place of his legal settlement, and *Wincanton* should have sent him *thither*.

The Master, Fellows and Scholars of *Suffex Sidney College* *versus* *Davenport*. B. R.

Bond to Doctor Craven, master, fellows, &c. of *Suffex* and *Sidney College*, solvendum to the master, &c. is a bond taken in their corporate capacity.

DEBT upon a bond to *Doctor Craven* (the Master,) Fellows and Scholars, &c. solvendum to the Master Fellows and Scholars; defendant craves oyer of the bond, and pleads that before the filing of the bill *Doctor Craven* died; the plaintiff demurs, and defendant joins in demurrer.

Serjeant *Poole*: The plea is bad, because this is a bond to the college in their corporate capacity, and a corporation never dies.

Mr. *Ford* *è contra*: I admit the plea is bad if the bond be taken in their corporate capacity, but it is to *Doctor Craven* Fellows and Scholars, &c. if it had been to the Master, Fellows and Scholars, &c. it would have been right.

Per curiam: There is no question but the bond being to *Doctor Craven*, &c. solvendum to the Master Fellows and Scholars, is a bond to them in their corporate capacity, and the duty is to the Master, Fellows and Scholars. Judgment for the plaintiff.

Simmonds

Simmonds *versus* Parminter and Barrow. Hil.
17 Geo. 2. Rot. 921. B. R.

THIS is an action upon the case upon several promises made by the defendants jointly, who have pleaded several pleas, and upon this record two issues are joined, one upon a demurrer in law, the other upon *nul tiel record*; the demurrer has been argued, and judgment thereupon is entred for the plaintiff; also a writ of inquiry of damages has been executed, intire damages given for the plaintiff upon all the counts generally, but nothing appears to be done upon the issue of *nul tiel record*. An action upon a bill of exchange lies for the drawer against the drawee after he has accepted it.

Sir Thomas Bootle for the defendants in arrest of judgment: This declaration contains several counts, and general damages being assessed upon the whole declaration, if any one count therein be bad, the judgment must be arrested. My objection is to the sixth count, which is laid in this manner, *viz.* That the plaintiff on the 28th of June 1739. at such a place, according to the custom and usage of merchants, made his certain bill of exchange in writing, and directed it to the defendants, then at *Bilboa* in *Spain*, and thereby requested them *at usance* to pay that his first bill of exchange in *Spain* to the order of *John Evangelist Cleere and company*, 4000 dollars in gold or silver, as to the exchange known to them that day value in account with the said gentlemen, as by advice, which bill the defendants accepted according to the usage and custom of merchants; and the plaintiff in fact saith, that the *usance* between *London* and *Madrid* time out of mind hath been at *two months*, and that the defendants did not pay to the said *John Evangelist Cleere and company*, or order, the contents of the said bill, but refused to pay the same, whereupon afterwards upon the 21st of September 1739. the said *John Evangelist Cleere* (having made no order concerning the payment thereof) protested the said bill at *Madrid*, according to the custom and usage of merchants upon such non-payment; by reason whereof the plaintiff, according to the usage and custom of merchants, became liable to pay to the said *John Evangelist Cleere* the contents of the bill, together with the interest, exchange and re-exchange and damages, which should accrue from the delay of payment thereof, and being so liable, he the said plaintiff afterwards on the 1st of January 1739. paid to the said *John Evangelist Cleere* the contents of the said bill, and also 36 l. 15 s. for the interest, exchange and re-exchange, costs and damages which did accrue from the delay whereof the defendant afterwards on the 15th of January 1739. had notice; by reason of the premisses, and by force of the usage and custom of merchants, the defendants became liable to pay the plaintiff the contents of the said bill, and the said

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sum of 36 *l.* 15 *s.* and being so liable, promised payment when requested.

My objection is, that a *drawee* who accepts a bill of exchange, and afterwards refuses to pay it to the *payee*, is not liable to the *drawer*, although it must be admitted he is liable to the *drawee* or his *indorsee* upon the acceptance thereof; and there is no such custom and usage among merchants as is set out in this count, or if there be any such custom, it is unreasonable and void; but if there be any such custom it lies upon the plaintiff to shew it, for I cannot find any such in any book that I have read, and if ever there was such a custom it must have been taken notice of by some mercantile author or other. And I never knew an action by the *drawer* against the *drawee* of a bill, unless it came back to him again by being indorsed to him. See *Bac. Abr.* 614.

Actions upon bills of exchange are grounded upon the custom of merchants, for *debt* will not lie for the *drawee* against the *acceptor* of a bill, because it depends upon a particular custom, and is not founded in contract. *Hard.* 485. Neither will an *indebitatus assumpsit* lie thereupon. 1 *Mod.* 285, 286. *Salk.* 125. S. P.

Serjeant *Poole* of the same side for the defendant: 1. There is no such custom; if there is, they must shew it out of some book of authority, or the court will not intend there is any such; before the *statute of 2. Ann* for making notes of hand negotiable like bills of exchange, an action was brought upon a note indorsed, and in the declaration it was laid that the defendant, according to the custom of merchants, was liable; and in arrest of judgment it was moved that there was no such custom, and if so, there was no consideration for the promise. *Holt* C. J. held the declaration ill, and said the court could not intend any such custom. And in the present case the demurrer does not confess any such custom as is laid, for there is no special custom set forth.

2. The custom contended for would be unreasonable if there was any such, and therefore void; for, from the very nature of the transaction the *drawer* is the *debtor*, and by his draught acknowledges so much money is owing by him to the *payee*, and the defendants, the *drawees*, only come in, in aid of him; and it may be compared to this case, *viz.* *A.* owes *B.* 20 *l.* *B.* requires it of *A.* who tells him if you will go to *C.* he will undertake to pay it for me; *B.* goes to *C.* accordingly, who undertakes to pay it in two months; at the end of that time *B.* demands it of *C.* according to *C.*'s promise, when *C.* tells him that *A.* is now able to pay him, and so he goes to *A.* who pays him his own debt. Is there any reason in the world that *A.* shall come upon *C.* to be repaid the

20 l. which was originally *A.*'s own debt due from him to *B.* and *C.* was only to come in in aid of *A.* there is no difference between this and the case at bar; and if the drawee accepts a bill and pays it, it is *prima facie* evidence of a debt due to him from the drawer. *Vide Lucas's Rep. in Lord Macclesfield's Time.*

Stracey, recorder of London, of the same side with the defendant: It is not set forth in the declaration how much 4000 dollars amount to in *English* money. There is another objection, and that is, that it appears upon this record that there is an *issue* of *nul tiel record* joined, and nothing further has been done upon that *issue*, but only judgment has been given upon the *issue* joined upon the demurrer, and therefore there is a *discontinuance*, which is not aided by the *stat. 4 & 5 Annæ, 2 Ld. Ray. 1482.*

Another objection there is, which has not yet been mentioned, and that is, that the bill of exchange is made payable to the order of *John Evangelist Cleere*, and it appears by the declaration that he never made any order upon the said bill, so there was no reason for protesting it.

Mr. Banks for the plaintiff: A bill returned protested for non-payment being once satisfied by the drawer to the deliverer, the drawer is discharged, and so is the acceptor as to him to whom the monies were paid; but the acceptor by virtue of his acceptance makes himself debtor, according to the custom of merchants, to the drawer. *Molloy de Jure Maritimo, lib. 2. sec. 35. fo. 306. Edit. 6.*

Serjeant Draper for the plaintiff: When a merchant draws a bill, he thereby acknowledges himself to be indebted to him to whom it is payable; so the drawee by accepting such bill owns himself indebted to the drawer. If I draw a bill upon a man payable to my self, or order, and he accepts it, he thereby acknowledgeth that he owes me so much money as the bill is for, *Salk. 130.* and so was the case of *Rawlinson v. Stone* lately, *1 Ld. Ray. 88.*

This is a contract between the drawer and acceptor, the meaning whereof is this, "I desire you to pay so much money to my order, and that shall be your discharge;" which, by under-writing the bill the drawee agrees to, and the money must be first demanded of the acceptor before the drawer be liable to the payee. *1 Salk. 127, 131.* The acceptor is liable to whatever indorsee the bill comes, *1 Lutw. 885. Death v. Serwonters.* If the drawee refuses to accept a bill, it is *nudum pactum* between him and the drawer; but if he does accept it, it becomes a debt *ex quasi contractu.* The acceptance of a bill of exchange is a trust, and if a man accepts a trust,

trust, he is bound to perform. 1 Salk. 26. *Coggs v. Bernard*. Et vide Justin. Inst. lib. 3. tit. De obligationibus quæ quasi ex contractu nascuntur, & tit. De gestu negotiorum. Ibid.

Mr. Norton for the plaintiff: After several arguments and judgment upon the demurrer, the defendant is too late, and cannot now move in arrest of judgment. *How v. Godfrey*, Mich. 4 Geo. 2. There was a demurrer to a declaration, and judgment for the plaintiff, and it was ruled the defendant could not move in arrest of judgment. The case in *Ld. Raym.* does not warrant the objection that here is a discontinuance, but if there is, it is aided by the Stat. H. 8. & 4 & 5 Annæ. It is objected that the declaration does not set forth how much 4000 dollars amount to in English money; in answer to this the jury have ascertained the value by finding the damages in English money.

The principal matter in this case, and upon which the whole must turn, is, whether here is not a good consideration for the promise laid in this count; and I agree, if there is not, the plaintiff cannot have judgment; it is certain the defendant has accepted the bill, and as certain that he has not paid it, whereby, and by the custom, &c. the plaintiff has been obliged to pay the bill with interest, exchange and charges of protesting. The defendant has not protested the bill as accepted by him for the honour of the drawer, and therefore according to the usual practice of merchants it must be intended he accepted it, because he had effects of the drawer in his hands. Vide *Molloy* 299. the nature of an acceptance for the honour of the drawer. 2 Stra. 1152. *2 Keb. 695. Smith v. Abbott*, Pasch. 14 Geo. 2. where the defendant accepted a bill of exchange to pay it when the goods consigned to him were sold, and held that it was a good acceptance, and bound him when the goods were sold; and *Lee Ch. Justice*, when he gave judgment in *Smith v. Abbot*, cited *Salk. 129. Molloy* 304. And if an acceptor do accept a bill generally when he has no effects of the drawer in his hands it is his own folly, because he might have accepted it conditionally.

A bill once accepted cannot be revoked by the party who accepted it, *Molloy* 303. 6th Edit. the reason is, because by the acceptance he confesses himself indebted to the drawer. Vide *Bac. Abr. 612.*

It is objected that the acceptor having paid a bill may bring an action against the drawer for so much money paid to his use; this may be true if the balance of account is not on the drawer's side, but the court will now intend that it was proved to the jury that the defendant had effects of the plaintiff in his hands.

It is objected that the *payee* never made any *order* upon the bill which is only payable to his *order*; in answer to this, if the *drawer* has an interest in the *acceptance*, he cannot be defeated of it either by the *acceptor* or *payee*; and if the *payee* had indorsed it he would have been liable to whomsoever the bill should come. This is a judgment by default, and therefore the jury must find some damages, the defendant having, in effect, confessed the action, though the merits of this count should be against us; and the court in their discretion may award a new writ of inquiry, as it is only an inquest of office, and to inform the conscience of the court, and then damages may be taken upon such other counts in the declaration as are certainly good.

Sir Thomas Bootle for the defendant in reply: Formerly it was not usual to move in arrest of judgment, but the way was to put in a plea in arrest of judgment; but of later times, if it appear upon the record that any count is bad, it may be taken advantage of by motion or writ of error. When judgment passes by default the defendant is out of court, and whoever then comes to move in his behalf, comes as *amicus curiæ* to inform the court of any error which may be in their judgment. My objection is singly *this*, which has not been answered, that the law never allowed this to be a *custom*; but it is said the *payee* having paid the money, raises a *consideration* between the *drawer* and the *acceptor*, whereas the count is laid merely on the *custom* of merchants; the old way was to set out the *custom* particularly and at large, but lately it has been laid generally, because the law takes notice of the *custom* of merchants as part of the law of the land; the tenor of the bill is to pay it to the *payee*, and not to the *drawer*.

Lee Ch. Justice: This count is laid upon the *express promise* of the defendant.

Bootle: The *promise* is not necessary to be laid in an action on a bill of exchange, because the action is not founded in *contract* but upon the *custom*. *Carth.* it is laid that by reason of the premisses and the *custom* the defendant became liable and promised.

Lee Ch. Justice: The *count* says that the defendant accepted the bill, and became liable by the *custom*, and being so liable *neglected payment*, and thereby the plaintiff was obliged to pay it, and did pay it; by reason of which premisses and the *custom* the defendant became liable, and so promised to pay the plaintiff; this seems to me, as at present advised, to be a good *consideration* to raise the *promise*.

C c c

Bootle:

Bootle : If this matter be taken in the manner your Lordship seems to say it must, it must be upon *contract*, but all actions upon bills are founded on *custom*. Indeed if the defendant had said to the *drawer*, I have not money by me at present, do you pay it to the *payee*, and I will pay you again; this would have been an express *contract*, and a strong *consideration*, being at the defendant's request; but what I rely upon is, that the *count* and *promise* laid therein are founded upon *custom* and not *contract*, and there being no such *custom* among merchants, it is bad.

Serjeant *Poole* in reply : Where there is a demurrer to a declaration upon one count and judgment is given therein, you cannot (I admit) in that case move in arrest of judgment, because the matter has been considered before; but where there is a demurrer to the declaration upon several counts, if any one of the counts is good the plaintiff shall have interlocutory judgment; yet nevertheless if upon executing a writ of inquiry he takes damages generally upon all the counts, and one is bad, the defendant may move in arrest of judgment.

The gist of this action is the *custom* of merchants, and there is nothing disclosed in the declaration that the *acceptor* requested the *drawer* to pay the *payee*; by reason of the premises, &c. The word *premises* relates only to the matter of fact, and the *custom* is what is relied upon in the *count*. What is said in *Molloy* 306. is a mere *dictum* of the author, for there never was a case like this.

Upon executing the writ of inquiry the only *evidence* laid before your Lordship was the *bill* and the *acceptance*, and that the plaintiff had paid the *payee* the money and charges, there was no evidence that the defendant had any effects of the plaintiff in his hands.

The whole court seemed to be of opinion for the plaintiff; and after time taken to consider over-ruled all the exceptions taken by the defendant; they said the *acceptor* had made himself liable to the *drawer* as well as to the *payee*, and to every *indorsee* to whom the *payee* should transfer the bill, and that a bill payable to the order of *A.* is the same as if it were to *A.* or order; and as to the *discontinuance*, that was helped by *stat. 4 & 5 Ann.* and judgment was afterwards given for the plaintiff, and upon a writ of error was affirmed in the house of lords.

Pond versus King. B. R.

ACTION upon a policy of insurance against the underwriter, A ship insured for a voyage or cruise of three months is taken by the enemy within that time, but before she is carried infra præsidia hostis, is retaken by an English man, and is now a living ship; this is a total loss to the insured.

upon the *Salamander* privateer (of which the plaintiff was a part-owner) from the *Downs* to any port or place where she should sail for three months from the 21st of December 1744. the premium was four guineas per cent. per month, interest or no interest, free from average, and without benefit of salvage; the insurance is against such perils as are usually mentioned in policies, but with a clause at the end, that in case the ship is not heard of in twelve months, then the money insured shall be paid by the insurer; the breach assigned is, that this ship the *Salamander* was taken by a French ship of war within the three months, and was wholly lost, whereby she could not prosecute her voyage or cruise. The defendant pleaded *non assumpsit*, and upon the trial at Guildhall the jury gave a special verdict; which first finds the policy in *hæc verba*, and then that the ship set out upon her cruise the 21st of December 1744. the time of making the insurance, and cruised until the time she was taken; that she was an English privateer duly commissioned, the number of men she had, and what guns she had at the time of the capture, and that within the three months, to wit, the 2^d of February 1744. she met a French ship in the Bay of Biscay, that in an engagement with her the *Salamander* was taken, that 117 of her men were taken out of her and carried into France, and her guns taken out, and that the *Salamander* thus taken remained in the possession of the enemy from 4 o'clock in the afternoon of the 2^d of February until 5 o'clock in the afternoon of the 5th of February; that before she was carried into any port she was retaken by an English privateer, the *Vultur* captain Hunter, and by him kept upon the high seas for eight days without sailing, and at the end of eight days the *Vultur* took a French prize, and together with her and the *Salamander* endeavoured to come into some English port, but the wind not permitting he carried them into Lisbon; that the *Salamander* remains there in the possession of the master of the *Vultur* for the benefit of those to whom she belongs; that the plaintiff is interested exceeding the sum insured; that the ship was prevented from finishing her three months cruise by the capture, but that she was a living ship at the end of three months; that Lisbon is a neutral port; that the master of the *vultur* commenced a suit in the court of Admiralty at Gibraltar against the *Salamander*, and sentence there was given the 29th of April 1745. and a decree was made that she should be restored to the owners on payment of one third part for salvage, which sentence still remains reversed, and the verdict concludes in the usual form. This special

special verdict was twice argued at the bar by Mr. *Erskine* and Mr. *Hume Campbell* for the plaintiff, and Mr. *Comyns* and Mr. *Henley* for the defendant, and after time taken to consider, the judgment of the whole court was delivered by

Lord Ch. Justice *Lee*: The question in this case is, Whether the capture of this ship, which was never carried *infra præsidia hostis* before she was retaken, and upon the matter as found by the verdict, shall be considered as a *total loss*, so as to intitle the insured to recover the whole sum insured. And although by the *civil law* perhaps it may not be adjudged a *total loss*, yet the *rules of that law* are not to govern us, but we must give our judgment according to the *common law of England*, and upon *this agreement* between the parties, whose intention appears, and must guide us. By the *civil law* there must be a *total loss* to entitle the assured to recover, but the *policy* in this case extends to captures or other accidents. The case of *Depiba* and *Ludlow*, Trin. 5 Geo. 1. C. B. before Lord King, is almost a case in point, and in that case he said he was bound to determine according to the *common law* and the meaning of the parties. The meaning of the parties here is plain, the insured paid his *premium* in consideration of the insurer's undertaking that the *Salamander* should cruise safely during three months; the jury has found she has been disabled from prosecuting her cruise for the three months: We are all of opinion for the plaintiff upon the breach assigned, and that *this* is not an *average loss*, but a *total loss* to the insurer; and the opinion in *Depiba* and *Ludlow*, Comyns 360. warrants us in saying this; the insurance is to be understood for the *voyage for three months*, and in common sense it cannot be otherwise; so whenever the voyage is broken or interrupted it is at an end. *Safety* during the *three months* is *what* is meant, but it appears the ship was taken and detained within *that* time, and that the plaintiff was hindered in his cruise; and *this*, by our law, is a *total loss* to the plaintiff. I have avoided saying any thing whether this was a prize or not, as being never carried *infra præsidia hostis*, because we are all of opinion this is a *total loss*. Judgment for the plaintiff.

Quære, Whether since this case there has not been a determination that this was only an average loss.

Lampley & al' and Thomas & al'. B. R.

Pleas at Westminster before the King himself of the term of Saint Michael in the sixteenth year of the reign of King George the second of Great Britain, &c. Roll.

Glamorganshire. **B**E it remembred, that on *Saturday* next after *Breve Domini* three weeks from the day of *Saint Michael* in *Regis non* this same term, before our sovereign Lord the King at *Westminster* *currit in* come *Lewis Lampley* and *Mary Thomas* by *Andrew Smith* their at- *Wallia.* torney, and bring in the court of our said Lord the King now here their certain bill against *William Thomas*, (and others) being in custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, of a plea of trespass; and there are pledges of the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, (to wit) *Glamorganshire*, to wit, *Lewis Lampley* and *Mary Thomas* complain of *William Thomas* (and others) being in the custody of the marshal of the *Marshalsea* before the King himself, of a plea of trespass, for that the said *W. T.* (and others) on the 22d day of *October* in the year of our Lord 1742. with force and arms took and carried away the cattle, to wit, two oxen, three cows and one calf, of the said *L. L.* and *M. T.* of the price of thirty pounds, and then found at *Reynoldson* in the county aforesaid, and converted and disposed thereof to their own use, and seised, took and carried away the goods and chattels, to wit, 20 cart loads of wheat in the straw, forty cart loads of barley in the straw, 50 cart loads of oats in the straw, and 400 bundles or trusses of reed of the said *L. L.* and *M. T.* to the value of forty pounds, then and there found, and converted and disposed thereof to their own use, and then and there did other wrongs to the said *L. L.* and *M. T.* against the peace of our Lord the now King, and to the damage of the said *L. L.* and *M. T.* of 50 *l.* and therefore they bring their suit, &c.

And the said *W. T.* (and others) in their proper persons come *Flea to the* and defend the force and injury, and say that the said county of *jurisdiction of* *Glamorgan* is one of the twelve counties within the principality or *the King's* *dominion of Wales*, within which county there are and time out of *Bench in* *Wales.* mind have been justices, and that all and singular pleas and actions, as well real as personal arising within the same county are, and at the time of exhibiting the said bill of the said *L. L.* and *M. T.* were, and for time immemorial have been, and of right ought to be pleaded and pleadable within the said county of *Glamorgan* before the justices there for the time being, and not here in the court of our said Lord the King before the King himself, and that they the said *W. T.* and (others) at the time of exhibiting the said bill of the said *L. L.*

D d d

and

and *M. T.* and before were, and from thenceforth hitherto have been resident and commorant in the same county, that is to say, at *Reynoldson* aforesaid in the said county; and this they are ready to verify, as the court here, &c. wherefore since the cause of action aforesaid arose in the said county of *Glamorgan* within the principality or dominion of *Wales*, the aforesaid *W. T.* (and others) pray judgment if the court of our Lord the King here will or ought to have farther *conusance* of the plea aforesaid.

Demurrer.

And the said *L. L.* and *M. T.* say, that notwithstanding any thing above pleaded by the said *W. T.* (and others) the court here ought to have further *conusance* of the plea aforesaid, because they say that the said plea, and the matter therein contained, are not sufficient in law to oust the court here from having or taking further *conusance* of the aforesaid plea, and that the said *L. L.* and *M. T.* have no occasion, nor are they bound by the law of the realm to answer the said plea in manner and form as the same is above pleaded; and this they are ready to verify; wherefore they pray judgment, and that this court will have and take further *conusance* of the said plea, and that the said *W. T.* (and others) may answer over to the bill of the said *L. L.* and *M. T.*

Joinder in demurrer.

And the said *W. T.* (and others) say that the said plea, and the matter therein contained, are sufficient in law to oust this court here from having or taking further *conusance* of the aforesaid plea, which said plea, and the matter therein contained, they are ready to verify and prove, as to the court here shall seem meet: and because the said *L. L.* and *M. T.* have not answered the said plea, nor have hitherto in any manner denied the same, they the said *W. T.* (and others) as before pray judgment if the court of our said Lord the King now here will or ought to have further *conusance* of the plea aforesaid; but because the court of our said Lord the King is not yet advised, &c.

* Rider.

This case was argued three times, the first time by Mr. *Hume Campbell* for the plaintiffs, and serjeant *Bootle* for the defendants, in *Hilary term* 17 Geo. 2. the second time by Mr. *Evans* for the plaintiffs, and * *The Attorney General* for the defendants, in *Mich. term* 18 Geo. 2. and the third time by Sir *John Strange* for the plaintiffs, and Mr. *Gundry* for the defendants in *Easter term* 19 Geo. 2. when it stood for the judgment of the court; but some of the parties dying the suit abated, so another action was brought by *Jones* against *Jones*, in which there was exactly the same pleadings as in the case of *Lampley v. Thomas*, which was argued by Mr. *Phillips* for the plaintiff, and Mr. *Charles Pratt* for the defendant, so that this great question, whether the court of King's Bench have *jurisdiction* to send

send a *latitat* into *Wales*, has been four times most learnedly argued at the bar by gentlemen of the greatest learning and experience.

Mr. *Hume Campbell* for the plaintiff: The plea is bad in *form* ^{1st Argument.} and *substance*, for wherever a plea goes to the *jurisdiction* of this court, it must give *jurisdiction* to some other; but there is no such court in existence as is set forth in the plea, which is, that there have been justices time out of mind before whom all pleas arising in the county of *G.* have been pleaded time out of mind, and not in this court; the court in *Wales* must mean the *Great Sessions*, which it is well known is not a court by *prescription*. 27 H. 8. c. 6. sec. 10. And all the Judges of *England* were of opinion that the Judges of the *Grand Sessions* must be appointed by the King's letters patent, 4 Inst. 239, 240. Another mistake there is in the plea, which alleges that the defendants are resident in the county of *G.* which is in effect denying that they are in custody of the marshal, which this court never allows to be put in issue.

The great question is, whether by the statutes of 12 Ed. 1. of *Wallia*, and the 27 H. 8. c. 26. which unite *Wales* to this kingdom, and erect the court of *Grand Sessions*, have given that court a *jurisdiction exclusive of this court*.

There cannot be a doubt but this *high court* held before the King himself, has a general *jurisdiction* over the kingdom of *England*, and if an act of parliament should annex or unite any other country to *England*, the King's Bench here would have *jurisdiction* over it if there were not words in the statute to exclude it; and in the *statute of union of Scotland to England*, it is declared that no alteration shall be made in the laws of *Scotland* which concern private right; but in the *statutes* which unite *Wales* to *England*, there is not a word to exclude the *jurisdiction* of this court; and to shew the legislature thought this court had such *jurisdiction*, see the *statute* 4 & 5 W. & M. for empowering this court to appoint commissioners for taking special bails. 1 Ed. 6. c. 10. where the under-sheriffs of *Wales* are required to attend *this court*, and the 18 Eliz. for appointing justices of assize in *Wales*.

The courts of *Chancery* and *Exchequer* exercise *jurisdiction* in *Wales*, as having *original jurisdiction*; and for what reason *this court*, wherein the King himself is supposed to be personally present, should be excluded, I cannot conceive, since there is no law that I know of which excludes it. Plowden 199.
b. Stradling
v. Morgan.

Bootle Serjeant for the defendant: The plea is good both in *form* and *Substance*; it alleges there have been justices in *Glamorganshire* who have time out of mind taken, and now do take *consuance* of all pleas

pleas arising within *that* county; this is a matter of fact, and an issue might have been taken upon it, but by the demurrer it is confessed to be true; and the reason for alledging that the defendants are *resident* in *Wales* is, because if they were not, perhaps they might be subject to the *jurisdiction* of this court; it is said, how can they be *resident* in *Wales* when, by the record it appears they are in custody of the marshal? but this is a fiction, and they cannot be supposed to be in his custody, but upon this further supposition that a *latitat* can run into *Wales* to take them, and that is the great question now before the court. And in 1 *Salk.* 1, 2. although a man may be in *custod' Mar'*, &c. one may claim *conusans.* 5 *Mod.* 310. S.P.

T. Raym.

206.

3 Keb. 401.

2 Mod. 10.

2 Bull. 156.

Het. 18.

Cro. Jac. 484.

Plowd. 127.b.

As to the substance of the plea, I shall not contend but that the *King's commission, and certain of his mandatory writs, and all judicial process may issue into Wales*, but a *latitat* or other *mesne process* cannot go out of this court into that *dominion* or *principality*.

Before the *stat. 12 Ed. 1.* of *Rutland*, called the *statut. Wallia*, *Wales* was a dominion of itself, governed by its own laws, and not subject to the laws of *England* with respect to the laws touching private right or property between one *Welch* subject and another; indeed, when any dispute arose between the *Prince* and the *Lords Marchers*, or the *Bishops*, in such case they applied to the *King's* great courts *here*, which determined the matter between them, because the *Prince of Wales* held his dominion (as a *feudatory*) of the *Kings of England*; there is a remarkable case in *Fitzherbert's Abr. tit. Assize*, 18 *Ed. 2.* cited in *Vaughan* 403. and which is not in the printed year books, though he says there are some MSS. copies extant of *Ed. 2.* (one of which I * have) which, by the hand writing appears to be of *that age*, the case at full length is thus (as I have translated it *verbatim*.)

* The reporter.

John Le Moigne sued to reverse a record of an *assize of novel disseisin*, which passed between *Alice of C.* and himself, and the case was, that *Alice* brought an *assize* against *John* and against other persons, and the writ of *novel disseisin* was brought to the sheriff of *Gloucestershire*, of her freehold in *Gowers*, and made her plaint of two *commots* which intirely comprehend all the land of *Gowers*, and the *assize* passed before *Sir John Bours* and his companions, justices assigned to take the *assizes* in the *Marches of Wales*, &c. *Basset* assigned the errors in this form: The writ of *assize* was directed to the sheriff of *Gloucestershire*, who is one of the sheriffs of *England*, and the tenements put in view were in *Wales*, which is another land, so that the writ shall not go, either of right, or by law, to the sheriff of one land, of tenements in another land; and forasmuch as the justices have taken the *assize* by such writ which was directed

directed contrary to law, *they have erred*; and also the land of Gowers, is out of the power of the sheriff of Gloucestershire, and the sheriff could not at all serve the writ upon the tenements out of his power; and forasmuch as the justices, &c. (as above) *they have erred*. And also, by the statute, *affizes shall be taken in the county where the land lies*; but Gowers is in *no county*, and for that they have taken the affize in *no county* at all, insomuch *they have erred*, &c. And also the writ was brought of her freehold in Gowers, whereas every writ shall be brought *de libero tenemento suo in a vill or hamlet*, but Gowers is neither vill nor hamlet but it is *one whole country or territory*; and therefore she ought to have brought her writ *de libero tenemento in the vills*, and have named all the vills of the country in which it lies, and for this the writ is bad; and forasmuch as they have taken the affize, &c. (as above). * *Scroop*: As to the first point, where you say that the writ shall not be directed to the sheriff of one land, of tenements in another, and that this was such a writ, &c. and that the tenements whereof the affize passed were out of the power of the sheriff of Gloucestershire, &c. and that the tenements *not in view*, and of which the affize passed, were not in the county; as to this I answer unto you, that Gowers is *one Barony of the Marches of Wales*, and we tell you that every Baron of the Marches hath his chancery and his own writs within his own barony, so that when one of his tenants hath done wrong to another, he shall do to him right; but when the baron himself is ousted intirely of his Barony, he cannot have remedy by his own writ, for he is ousted of all, and therefore it was *ordained in the parliament* that when a Baron of the Marches is himself ousted wrongfully of his Barony he ought to resort to his Sovereign Lord, that is to the King, to purchase remedy, and shall have a writ in the chancery of the King, and that writ shall go to the sheriff of the next county in this land, and he shall serve the writ, because that the Barons of the Marches are not within counties, therefore as to this, that the sheriff of Gloucestershire served the writ, it was because he was the next sheriff to the land, wherefore as to this process, there has been no error. And as to that which you say, that the writ was not brought in the vill or hamlet, this challenge laid when the parties pleaded in court to this writ, but the parties have taken the writ as good, and the justices have not erred, nor as you have not challenged the writ, it shall, in this case, be now taken to be good; and because there is no error at all in the record, where you have assigned, we affirm the judgment, and you Alice may have execution of the land, and Marshal! do you take custody of John for the damages, &c.

* Chief Justice
of the King's
Bench.

Writs of *quare impedit* have often been brought of churches in Wales in the King's courts here, but that was either because the dispute was between the lords marchers, or between the bishop and others, and because the Princes of Wales could not write to the bishops in Wales. 12 Ed. 3. c. 2. 34 & 35 H. 8. 27 H. 8. 1 W. & M. 5 Eliz. c. 23. 409.

E e e

There

There are several *statutes* that give particular powers to this court which it exercises into *Wales*, but none that give it power to send *mesne process* there, between subject and subject; and there is no instance where it was ever determined that this court sent a *latitat* into *Wales*, nor has ever any *latitat* gone there till within three or four years last.

Lee Chief Justice: I hope those gentlemen who are to argue this case the next time against the *jurisdiction* of this court into *Wales*, will let us know upon what foundation it is, that any other court in *Westminster-hall* can exercise a *jurisdiction* by sending *mesne process* into *Wales*, and why this court cannot, which will guide me very much in the judgment I am to give.

Serjeant Bootle: The court of *Exchequer* says, that the debtor of the King is considered as in the King's place, and so privileged to sue in which court the King pleases, which has usually been in the *Exchequer*. Here ends the substance of the first argument.

2d Argument.

The 2d argument. Mr. *Evans* for the plaintiff: What the original state of *Wales* was before the *stat. 12 Ed. 1. of Snaudon or Ruthein* is very much doubted; some say it belonged to *England* before that time, others say it was quite independent upon it; I am to contend that it was originally part of *England*, and belonged to it, which is a little hard for me to do, who am a *Welchman*; the evidences to prove this, are the declarations of the *Kings and Parliament of England. 12 Ed. 1. 27 Hen. 8. and Dodderidge in his treatise of Wales* says, "it was separated or divided from *England* by some of the *Saxon Kings*;" if this be true, it follows that all the King of *England's* high courts had *jurisdiction* in *Wales* originally.

The Princes of *Wales* were amenable to the Parliament of *England*; the Parliament could have no power to summon any one to Parliament who was not a subject of *England*; from hence it is plain *Wales* was a part of *England*.

Wales may be considered in the nature of the counties *palatine*, and it never was disputed but they are part of *England*; and if a judgment be given in any court at *Westminster*, the subject has a right to have execution out of that court into the counties *palatine*; and the reason given why these courts have *jurisdiction* for *mesne process* into the counties *palatine*, is, because the King's courts before had such a *jurisdiction* antecedent to their being counties *palatine*, and there is now no doubt but this court can issue an execution into *Wales*.

That *Wales* was part or holden of *England*, the case of *David*, brother to Prince *Fluellin*, plainly shews, for if it was not, *David* could not by the law of nations have been hanged for a traitor; and *Ed. 1.* is said to have suppressed the rebellion there, not to have conquered *Wales*. 4 *Inst.* 239.

Supposing I have proved that this court had original jurisdiction, the acts of Parliament relating to *Wales*, and for erecting courts there, having no negative words in them as to the King's great courts, have not excluded them; the whole intent of those statutes seems to be only to bring all the people of *England* and *Wales* under one law, and that those who were poor might obtain justice near home, was the reason for erecting the court of *Grand Sessions*.

In the statute 34 & 35 H. 8. cap. 26. sec. 115. there is this clause, which puts this matter out of doubt: "Item, That all process for weighty and urgent causes shall be made and directed into *Wales* by the special commandment of the Chancellor of *England*, or any of the King's Council in *England*, as heretofore hath been used; any thing in this act to the contrary notwithstanding;" this shews it was the intent of the legislature to give jurisdiction to the *Grand Sessions* for less causes, and to leave the people if they pleased to come here upon weighty causes, as they had heretofore done; it seems plain to me that these courts at *Westminster* have exercised jurisdiction in *Wales* before this statute.

The St. 29 Car. 2. c. 5. gives power to the judges of the courts here to grant commissions to persons to take affidavits in *Wales*, and the 4 & 5 W. & M. the like as to special bails; what can be the use of Commissions to take bails if mesne process and original process will not run into *Wales*, it must be the sense of the parliament that such process went there.

All the courts of *Westminster-hall* exercise their authority by a power they have had time out of mind; as to the exercise of jurisdiction into *Wales*, I do admit it is a little in the dark before the time of Hen. 8. I can find no instances of process into *Wales* in the time of the Princes thereof, except that of *David Fluellin*, there were certainly defects in the jurisdictions of the Lords of the *Marches of Wales*, that there were not in the *Principality*; for if a question arose between two Lords of the *Marches of Wales* touching the boundaries of their lands or territories, such question was usually determined in the King's courts here, and in many cases of *Dower*, where the loyalty of marriage is to be certified by the Bishop, both in the *Marches* and in the *Principality* these courts here have entertained jurisdiction.

All the courts in *Westminster-hall* are upon an equal foot with regard to the *statutes* relating to *Wales*, but it is said *subpœnas* and *quominus's* sent *there* out of the *Exchequer* are *prærogative writs*, and are granted to the plaintiff as being the *King's debtor*; every body knows that is a mere fiction, as much as *in custodia mar' &c. is*, the court of *Chancery* here also exercises *jurisdiction* into *Wales*, and yet there is also a court of equity in *Wales* who have a concurrent *jurisdiction* there; there have been instances of *latitats* sent *there* out of this court, and no doubt but *mandatory writs* may go *there* from hence; and it seems admitted on all sides, that *judicial writs* will run into *Wales*. *Ireland* is no part of *England*, nor ever was, but became annexed to the crown by conquest.

A *tertenant* of lands in *Wales*, who is bound by a judgment in this court, is liable to be served with a *scire facias*, and at the same time it is said he is not liable to be served with a *latitat* of this court; this seems very strange, and I desire *Mr. Attorney General* will account for it. A judgment *here*, shall, and may lawfully be executed in *Wales*, why? because it *attaches* and binds lands and goods in *Wales*, and therefore *Wales* must be within the *jurisdiction* of this court.

Mr. Attorney General for the defendant: As to the *objection* to the *plea* made upon the former argument, I shall only say that whether there are justices, and courts in *Wales* to administer justice, is a matter of law, and that this court must take notice there are courts of justice in *Wales*, they being taken notice of in many *public statutes*; and therefore the plaintiff might have had justice *there*, if he had thought fit.

This action is brought for the sake of trying this great question, whether the subjects of *Wales* may be drawn hither at a great expense, and the officers of this court who have freeholds in their offices be enriched, if they can prevail. There are *bounds* to the *jurisdiction* of this court, I will venture to say.

Lee Chief Justice: The law is the true *boundary* of *this* and all other courts.

Attorney General: It appears, upon the face of this record, that the cause of action arises within a county in *Wales*, and that the *venue* is laid *there*; that the defendant, at the time of the commencement of the action was an inhabitant in *Wales*; and therefore justice might certainly have been administered in the court of *Wales*, so there can be no defect of justice, supposing *this court* shall be of opinion that this is an improper action to be brought *here*.

Antiently

Anciently before the statute of *Rutland*, *Wales* was governed by its own princes and laws with respect to private property as between *subject* and *subject*, but, in all probability, was held *jure feodali*, as many of the Princes of *Germany* now hold their *dominions*; as *Ireland*, the *Isle of Man*, *Guernsey*, and *Jersey* are now held of the crown of *England*; because *Wales* was subject anciently to the *state-power*, and *state-writs*; and there is a great difference between the *Princes and great men of Wales*, being summoned to the *English parliament*, and being cited to appear in *this court*. It does not appear by any book of authority or record that *this court* before the *statutes of Wales* had any *jurisdiction* to send *original process* into *Wales*; and so I may fairly conclude it had *none*, and if it had none, it cannot be ousted of any.

But supposing *this court* anciently had *original jurisdiction* in *Wales*, yet by the *statutes* made touching it, although there are no express *negative* words, yet it appears to be the plain intent of the legislature when they erected the *grand sessions*, and settled the *process thereof*, to exclude *this court*, from several parts of the *statute*; the same is also apparent from the *maxim* of *breve domini regis non currit in Walliam*, from the law-books, and the *usage* of *this court*. The court of *King's Bench* has a particular *jurisdiction* given to it by the very 34 & 35 H. 8. same *stat.* which erects and directs the court of *Wales*.

The court of *Common Pleas* has not any *original jurisdiction* into *Wales* neither in *real* or *personal* actions, nor ever exercised any, and if it has none, *this court* cannot have any; there never was any *fine* or *recovery* in the *C. B.* of lands in *Wales*, nor would any conveyancer pass such a title; there is *no curfitor* to make out an *original writ* either in *this court* or the *C. B.*

But it is objected the court of *Exchequer* sends *subpœnas* and *quo minus's* into *Wales*, and when the cause is at issue, sends it by *mitimus* to be tried in the *next adjacent county*; I must confess I do not know by what rule of law this is done. But in *this court*, this is quite a new attempt, and it is most strange if here had been an *original jurisdiction* that it has never been exercised, and therefore I may say as it never exercised any *jurisdiction*, it cannot now do it, like what was said upon the *statute of Merton* upon the disparagement of the heir by marriage, that no action could be brought for *this*, upon the *statute*, inasmuch as it was never seen or heard that any action was brought upon the *statute*. *Lit. sec. 108.* for if such action would have laid, no doubt it would some time or other have been brought.

The practice of *one court* in the hall is not to be governed by *that* of *another*, there is nothing more certain than that *they* have different

jurisdictions, and each by *prescription*, and have also different rules of practice, and the *practice of a court* is always said by the judges to be the *law of the land*; and the court of *Exchequer*, as appears by multitudes of precedents for many many years, have exercised a *jurisdiction*, by sending their *first process* into *Wales* without any interruption whatever, and this particular practice of that court is part of the law of the land.

But whether the court of *Exchequer* has such *jurisdiction* or not, is all one to *this court*, the law of one court may not be the law of another court; the *Exchequer* takes consue of the King's revenue, *this court*, of pleas of the crown, and the *Common Pleas* of all actions real and personal between subject and subject.

The court seemed still inclined to carry the *latitat* into *Wales*, but ordered a further argument.

3d Argument.

Sir *John Strange* for the plaintiff: I shall take no notice of the objections to the pleadings, but go directly to the main question, which is; whether *this court* can send a writ of *latitat* into *Wales*, which, if I make out that they can, the plaintiff will be intitled to a *respondeas ouster*.

If I can shew that *this court* ever had a power to send a *latitat* into *Wales*, it will lie upon the other side to shew that power has been taken away.

1st, I shall consider how *Wales* stood before the time of *Ed. 1.* from whence I shall infer that *this court* had original *jurisdiction*.

2dly, I shall prove that the *stat. H. 8.* and the erecting of their courts upon the place, only gave them a concurrent *jurisdiction* with *this court* in *Wales*.

3dly, I shall maintain the *jurisdiction* of *this court* by several recognitions of authority, and shall shew that the court of *Exchequer* stands upon the same footing with *this court*, and

4thly, I shall take notice of such arguments as have before been offered for the defendant.

As to the 1st of these; *England* and *Wales* were anciently one kingdom and nation, governed by the same laws and religion, and used the same language. 2 *Mod.* 11. *Hale's Hist. Com. Law.* 219. *St. of Wales* 12 *Ed. 1.* *Wales* was holden of the crown of *England*, *Dodder.* 3. When *Wales* rebelled, they were always treated as *Rebels* and *traitors*, and not as enemies. 4 *Inst.* 239. and being forfeited by

by the *treason* of its *Prince* became intirely in the crown of *England*; and the *stat.* 27 *H.* 8. c. 26. in the preamble, declares it to be a member of the crown, and it may not be improperly said to be in its remitter, from hence it may be inferred *this court* had original jurisdiction in *Wales*. Salk. 417. Plowd. 118.

2dly, The establishing courts in *Wales* gave them a concurrent jurisdiction with *this court*, which they had not before, as appears from the *stat.* 12 *E.* 1. 27 *H.* 8. c. 16. s. 9. and the reason given for erecting those courts is, because the inhabitants were so far from *London*, and 34 & 35 *H.* 8. c. 26. gives them power to hold pleas in as ample manner as the courts here, but it is observable that the courts of *Wales* have not a concurrent jurisdiction with *this court* by this statute; whatever jurisdiction *this court* exercised in civil suits is not mentioned, but only on the crown side, and the statute can never be intended to disrobe *this court* of any jurisdiction it had before. Sect. 115. of the last *stat.* is the strongest proof that *this court* had original jurisdiction, and the words *Chancellor* and *King's Council* mean the judges. 43 *Affiz.* 35. The whole of this 2d head may be reduced to this, that either *this court* had original jurisdiction and the statutes have not taken it away, because there are no exclusive negative words, or if it had not original jurisdiction; the *stat.* 34 & 35 *H.* 8. c. 26. sect. 115. has given it a concurrent jurisdiction.

3dly, The recognitions of the legislature, 29 *Car.* 2. c. 5. 4 & 5 *Salk.* 461. *W.* & *M.* c. 4. 11 & 12 *W.* 3. c. 9. 12 *Geo.* 1. and by *St.* 43 *Eliz.* The *Welch* counties are contributory to the poor prisoners in the *King's Bench* prison, 11 *Geo.* 1. *Wales* is parcel of the realm of *England*, and a *ne exeat Regno* will not lie to hinder a man's going into *Wales*. 7 *Rep.* Calvin.

4thly, It is said the *Exchequer* has jurisdiction by prescription and by *prærogative process*; and I say we have here, by the defendant being in *custodia Mar'*. It is said the *King's Bench* has not exercised any jurisdiction; I answer, neither did it, till lately, send writs of *latitat* to the *Cinque ports*. There is a jurisdiction into *Wales* in some of the courts in the hall, as in the *Exchequer*, and if there has been such an usage in any court, all the *King's high courts* must have the same, which is an answer to *Co. Lit.* 81. cited by *Mr. Attorney General*; it is laid down by the other side as a maxim of law *quod breve domini regis non currit in Walliâ*; this saying is explained by Judge *Atkins*, 2 *Mod.* 12. and cannot mean that no writ at all runs into *Wales* out of *Westminster-hall*, for the contrary is admitted on all hands. 4 *Inst.* 531.

It is objected by the defendant, that jurisdiction is given by statute to *Westminster-hall* as to the county of *Monmouth*. I answer, *Monmouth* is made a part of *England* to every intent and purpose.

It

It is objected that the *stat. Ed. 6.* gives the courts *here* power to award *writs of exigent* into *Wales*, from whence it is inferred they can send no other *writs there*; I answer, this proves too much, because it is agreed on all hands that many *writs* go, as *executions*, &c. or there would be a failure of justice: this *statute* mentions, that the sheriffs of *Wales* shall have deputies *here*, to receive all *writs* issuing out of the *K. B.* and *C. B.*

Gundry for the defendant: All the gentlemen who have argued for the plaintiff have begged the question, and taken it for granted that *this court* had *original jurisdiction*; saying, pray tell us how it is taken away. Now it is most certain that in the space of 450 years *this court* never sent any *latitat* into *Wales*, and if *long usage* will give *jurisdiction*, the *same non-usage* is the strongest proof against *jurisdiction*.

1. *Wales* was no part of the realm of *England*, neither before nor after the *stat. 12 E. 1.* until the 27 *H. 8.* nor had the laws of *England* any place *there*, from whence it will follow that *this court* had no *original jurisdiction*, though I admit it to be part of the *dominion* of the crown of *England*.

2. This court never claimed, or exercised any *concurrent* or *exclusive jurisdiction* in *Wales*, except in some things, and in *those*, only between the *Lords Marchers*.

3. By the *Stat. of union*, or any other recognition, this court has not been admitted to have any *original jurisdiction*, and the 115 *sect.* of 24 & 25 *H. 8.* means quite another matter, the words *weighty causes*, and the words *King's council*, do not mean the Judges here.

4. I will shew the difference between counties *Palatine*, *Cinque Ports*, and *Wales*.

5. Then I shall answer the objections, as they fall in my way.

N. B. Mr. Gundry set out in his argument in this methodical way, but did not pursue it.

David Fluellin was not tried at *this bar*; *Lord Co. 4 Inst. 239.* mentions no such thing, but most probably was tried in *Wales* by the *King's commission*. *Doctor Wotton on Welch laws, fo. 518.* speaks of commissions into *Wales* in extraordinary cases *temp. Ed. 1.* which shews that *this court* had no *jurisdiction*.

The *Princes* of *Wales* were antiently *Kings of Wales*, 4 *Inst. 239, 243.* and *King Edward* claimed the same *feudal sovereignty* over *Scotland* as he did over *Wales*. *Ryley's Pl. in Parl. 157.* This appears in the case between the *Kings of England* and *Scotland*; there is one thing particular in *that record*, that it appears to be *coram domino Rege*

Rege & concilio suo, and the judges, which serves to explain what is meant by the King's council in the stat. 34 & 35 Hen. 8. c. 26. f. 115. the same book fo. 145. in the same year, and to the same purpose. Edward the first, before the St. of Snowden, plainly treated Wales as a conquered country; and in the 3 Ed. 1. c. 17. which provides remedy in cases of distress, it is said at the latter end of it, and this is to be intended in all places where the King's writ lieth, and if that be done in the Marches of Wales, or in any other place, where the King's writs be not current, the King which is Sovereign Lord over all shall do right there unto such as complain; and that is because a replevin would not lie here.

Before the stat. H. 8. all the lands in *Wales* were held and governed by the laws of *Wales* and not of *England*. *Co. Ent. Quo Warr. 549. 4 Inst. 244.* And the writs run *contra pacem* of the Lord Marcher, and the Lords Marchers had judgment of life and limb. 27 H. 8. c. 24 Ryley 63, 141. They had power to hold plea in all actions real and personal, nor could the King *intromittere*, which is the very expression in *Coke's Entries*.

There were two sorts of causes wherein the King's Bench had jurisdiction, one was, where the Lords Marchers themselves were parties, and the other in cases of *quare impedit*; the first was, because none can be judge in his own cause, the other, because no writ laid to the bishop, or he would not obey it, because he thought himself as great a man as a Lord Marcher.

To shew that *Wales* was no part of *England*, that this court never exercised any jurisdiction there, except in cases where lands were held of the King, and except as above, and to shew the difference between *Wales* and Counties Palatine. *Fitz. Jurisdic. 34. 26 H. 6. 34. 3 Ed. 3. 19. 40 Ed. 3. 1. 11 H. 6. 3. 19 H. 6. 12.* Writs of error always laid from counties palatine, but not in *Wales*, before 34 Hen. 8. because *Wales* was no part of *England*, but counties palatine always were.

It is said the stat. H. 8. gave this court jurisdiction by introducing the laws of *England* into *Wales*; I answer it did not, for *Poyning's law*, which introduced the *English* laws into *Ireland*, did not give the courts here jurisdiction in *Ireland*.

Between the 27 & 34 Hen. 8. (which last stat. gives the writ of Stat. 5 Eliz. error in real and mixt actions) no writ of error was brought in this court, and if it had original jurisdiction there would have been no occasion to give the writ of error by the statute 34 H. 8. sec. 103. and as error was thus given in real actions and mixed, so by the St. W. 3. it was also given in personal actions.

Ryley 98,
211.

The gentlemen on the other side would have *weighty causes* in the *stat. 34 & 35 H. 8.* to be understood to mean *all causes*, but I have already shewn they do not; they would also have *King's council* to mean the *Judges*; but it is well known that in *Hen. the 8th's* time that it meant the *King's Privy Council*, and sometimes the *house of Lords*, as the *great council of the nation*, the *Judges* at that time were never mentioned as the *King's council*, but were known by the name of *his Justices* or *Judges*, whatever they might be anciently stiled.

It is objected that *this court* and the *Common Pleas* send executions into *Wales*, and therefore why may they not send *first process* thither? I answer, there has been *long custom and usage* in the one case, and without it, there would be a failure of justice, but in the other there has been *no usage* at all; and *Wales* has *superior courts* of its own. And as to the *Exchequer*, the *King* and his *debtors* have always had *prærogative process* into *Wales*, which has never been disputed.

Here ends the substance of the first three arguments, the last whereof was in *term Pasch. 19 Geo. 2.* when the court ordered this case to stand over for judgment; and some of the parties either died, and the suit abated, or the clerks of the office of pleas in the *Exchequer*, who were much interested in this question, and were afraid the court would over-rule the plea, put an end to the cause, but a new action was forthwith brought in the name of *Jones v. Jones*, wherein there were exactly the same pleadings as in the case of *Lampley v. Thomas*, which was argued at the bar in last term; but as the subject had been quite exhausted before, nothing more that was new could be said upon it; and so the court, in *this present term*, gave judgment for the defendant and allowed the plea, without saying more than these words, *viz. Breve domini Regis de LATITAT non currit in Wallia.*

Rex versus The Bishop of Chester. B. R.

A mandamus lies not to a visitor, who has deprived a prebendary for incontinency.

RULE to shew cause why a *mandamus* should not go to the *Bishop*, commanding him to restore the Reverend Mr. *John Prescott*, Master of Arts, to the place and office of one of the *Prebendaries* or *Canons* of the cathedral church of *Chester*.

This rule is made upon the affidavit of Mr. *Prescott*, who swears that the *Bishop of Chester* for the time being is visitor appointed by *Hen. the 8th* who was the *founder*, and that he (Mr. *Prescott*) was collated to the *Prebend* by a former *Bishop*, and that the present *Bishop* had decreed in his *visitatorial court* that Mr. *Prescott* ought to

to be punished, expelled from, and deprived of his *Canonry* or *Prebend* for *fornication* and *incontinency*, and that Mr. Prescott was deprived of it accordingly. The affidavit also set forth some of the *Founder's statutes*, and among the rest, one stiled *De corrigendis excessibus*, by which Mr. Prescott insists that it appears he ought to have been *three times admonished* against the crime he had been deprived for committing, and that not having been *thrice so admonished*, that the bishop had no power to *deprive* him.

Sir Richard Lloyd against a *mandamus*: *Mandamus's* are issued by this court to command persons to do *that* which is their duty to do, but if the court does not know *what* is the *Bishop's duty* in the present case, it is absurd to apply for a *mandamus*; and unless the crown has made this court the *visitor*, it cannot intermeddle; on the contrary it appears the *Bishop* is *visitor*.

But Mr. Prescott objects he has not been *thrice admonished* against his crime; What? does a *Clergyman*, who ought to *instruct* and *admonish* others, want to be *thrice admonished* himself against being a whoremaster?

Suppose the *founder* has given them statutes which the *visitor* has not exactly pursued, yet as the members of this church, are, among themselves, a private body, and the King has given this private body a Judge who has absolute power, as to church government, over them, *this court* will not interfere, and upon the *return*, if it appears there is a *visitor*, *this court* will not grant a *peremptory mandamus*, *Doctor Witherington v. Corp. C. C. Cambridge*. And Holt's opinion 1 Sid. 71. in *Phillips v. Bury*, *Skin. 475.* against the opinion of the other three Judges was established in the *house of Lords*.

Mr. Gundry against a *mandamus*: There is neither reason nor precedent for making this rule absolute; the *sentence* complained of, is *deprivation* by the *Bishop*, whom Mr. Prescott admits to be the *Visitor*; by the *sentence*, which is not denied to be true, it appears Mr. Prescott has been guilty of gross immorality, and now he comes here for redress, without denying the truth of the sentence.

If there had been a want of *jurisdiction*, or if the *Bishop* was proceeding contrary to the *statutes* of the *founder*, Mr. Prescott ought to have applied for a *prohibition before sentence*, for no case of a *mandamus* after *sentence* can be cited. 1 Sho. 74.

In *Phillips and Bury*, the point of the case was, and what the *house of Lords* gave judgment upon, that the acts of a *visitor* are not examinable in the *courts of Westminster-hall*, and *this* has not been since denied; for the law gives great credit to the acts of a *visitor*. *Kenn's case*, 7 Rep. 44.

The

The King v. Doctor Walker, Hil. 9 Geo. 2. Mandamus to Doctor Walker, Vice-Master of Trinity College in Cambridge, to execute a sentence of deprivation against Dr. Bentley who had been removed; Doctor Walker returned that the King was founder, and had appointed the Bishop of Ely Visitor, and the question was, whether a peremptory mandamus should go; and *per curiam*, the mandamus was quashed, because it was to a *forum domesticum*.

Doctor Sherlock's case was a mandamus to restore him to a Prebend of Norwich, which he was intitled to, as being Master of Catherine Hall in Cambridge; and the reason the court gave for granting the mandamus in that case was, because *this Prebend* was annexed to the Mastership of Catharine Hall by act of parliament, which made it a kind of a lay-fee, and the court granted a peremptory mandamus, because there was no visitor returned.

It is objected Mr. Prescott has been deprived contrary to the statutes of the founder; to this I answer, there is no case wherever this court examined the legality of a deprivation by a visitor.

Mr. Henley against a mandamus: Lib. Affiz. 8 Ed. 3. p. 29. every Guardian of an Hospital, if it be lay-fee, is visited by the Patron, if it be spiritual, by the Ordinary, and if he be deprived by the visitor he shall not have an affize. More modern cases have proceeded upon the same principle, for the visitor has always been considered as absolute Judge in all cases of this kind, unless an act of parliament has intervened and made it a public thing.

But it is said on the other side, that it appears the Bishop is only a partial visitor, and that there are necessary steps to be taken before he has jurisdiction to deprive, which have not been taken in the present case; and this objection is founded on the statute *de corrigendis excessibus*; in answer to this, it appears by the statutes that the Bishop is to visit *si rogatus vel non rogatus*, and is to take care that the statutes be duly observed, and to punish according to the crimes committed, and to do every thing which appertains to the visitatorial office.

Sir Thomas Bootle for a mandamus: I admit the Bishop is appointed visitor, but his power to deprive is limited and circumscribed, for he must admonish three times before he can deprive, and a Prebend is a freehold for life, and not a mere spiritual office; and therefore if he be deprived of his stall, why should he not have a mandamus to be restored to it, as well as a schoolmaster or usher, who are for life. 2 Sid. 112.

If any court holds *jurisdiction* where they have none at all, their proceedings are void. *Hob. 63.* a *visitor* stands upon the same foot if he goes beyond his *jurisdiction*.

Suppose an *ejectment* was brought for any part of the lands belonging to *this stall*, the court must examine into the legality of the deprivation; *Holt C. J.* in *Phillips and Bury*, does not say to the contrary. And if a *Visitor of a college* refuses to visit it, this court will compel him by *mandamus*. This motion was made in the last term, when the court said what follows.

Lee Chief Justice: The difficulty with me is the manner in which *Mr. Prescott* now applies; I think, (as at present advised) he ought to have applied for a *prohibition* when the matter was under consideration before the *Bishop*; there is no doubt but *this court* will interpose in one way or other whenever any person takes upon him to exercise a *jurisdiction* which he has not, but in the present case it is admitted the *Bishop* is *Visitor*, which, I think, has always been held to be a flat objection to *this court's* granting a *mandamus* in the like case; besides, I do not know that any *mandamus* was ever granted after a sentence of this sort; and *Mr. Prescott* may have another remedy by an *ejectment*, and so was the case of *Phillips and Bury*.

Wright Justice: The case of *Broad Oaks*, *Hil. 12 Ann.* he was a *Fellow of Winchester College*, and was expelled by the *Bishop*; the question was, whether the *Bishop* was *Visitor*; the court on the motion refused to grant a *mandamus* to restore him, but by consent a *prohibition* went to try that point; this is my note of that case.

Denison Justice: If we should grant a *mandamus*, and it should appear that the *Bishop* is *Visitor*, (which that he is, is admitted on all hands) we could not grant a *peremptory mandamus*, the consequence of that must be, that *Mr. Prescott* must bring an *action for a false return*, wherein he must fail, therefore I think it most proper to try it in an *ejectment*.

Then the court adjourned it until *this term* for consideration.

Lee C. Justice: We are all of opinion, upon full consideration, that this rule must be discharged, and that the *Bishop* may exercise his visitatorial power (as he has done in this case) *without admonishing the party thrice*; where it does not appear whether there is a *Visitor* or not, this court has granted a rule to shew cause, but when it appears there is a *Visitor*, this court cannot intermeddle; and we think the *Bishop* had *jurisdiction* notwithstanding the statute *de corrigendis, &c.*

Rule for *mandamus* discharged.

H h h

Subley

Subley *versus* Mott and another. B. R.

There is a difference between an action of conspiracy against two persons, and an action upon the case founded on a wrong done by two persons; in the first, if one be found Not guilty the judgment must be arrested, but not so if one be found Not guilty in the latter case.

THIS is a special action upon the case against two persons for a malicious prosecution carried on by them against the plaintiff, in causing her to be indicted without any probable cause; and the jury found one defendant guilty, and the other Not guilty.

It was now moved in arrest of judgment by Mr. Smythe, who objected that the action does not lie against two, for the malice of one person is not the malice of another; and cited *Bro. Joinder in action*, p. 6, 15, 27, 41. and *Lowfield v. Banerost & al.*, Trin. 5 Geo. 2. which was an action for a malicious prosecution; the jury would have found 800*l.* damages against one defendant and 100*l.* against each of the others, but the Chief Justice saying it could not be done, the jury gave a verdict with 1100 damages.

But supposing this kind of action will lie against two when they are guilty of a joint offence, whether they must not both be proved guilty? I submit it they must, and it is not like *trespass* against several defendants, where one may be found guilty and the rest not so, and well enough.

Upon an *assumpsit* to do two things, if the defendant says that he assumed to do two other things, *absque hoc* that he assumed to do the two things before alledged, upon which they are at issue, and the jury find that he assumed to do the one but not the other, this is found against the plaintiff, for it is not the same promise that is alledged in the declaration. 2 Rol. Abr. 703. p. 12.

In a *præcipe quod reddat*, if the issue be, whether A. and B. enfeoffed the tenant, and it is found that A. enfeoffed him, and not A. and B. this is found against the tenant *in toto*, who affirms that A. and B. enfeoffed him. 2 Rol. Abr. 706. p. 36.

In an action by two churchwardens, if the defendant plead that at the day of purchasing the writ they were not churchwardens, and the jury find that one of them was, but the other was not; this is found for the defendant, for they were not churchwardens. 2 Rol. Abr. 706. p. 38.

If a contract be alledged to be made with two jointly and universally, and it is found that the contract was made only with one of them, the plaintiff shall not have judgment upon this verdict, for it is not the same contract; upon this motion a rule was made to shew cause why the judgment should not be arrested in the last term. And

And Mr. Ford for the plaintiff came *this term* and shewed cause, and insisted that this is not an *action of conspiracy*, which is a formed writ in the Register, but is a *special action upon the case* founded on a tort done to the plaintiff by two persons who charged her with felony, caused her to be indicted and tried; whereof she was acquitted; and in an *action* founded upon a *tort* the plaintiff is not bound to prove the whole matter laid in the declaration. In the case of *Jones v. Gwynne*, Hil. 12 Ann. before Lord Parker, this difference was holden between an *action of the case on contract*, and on a *tort*; in the first, the whole contract must be proved, in the latter so much will do as proves the plaintiff had a good cause of action; if this had been an *action of conspiracy*, brought upon that particular writ which only lies against two or more persons, it might have had another consideration, but as this is an *action on the case* founded on a wrong, it will lie against one or more persons, like an action of *trespass*, and if any of them be found guilty, the plaintiff shall have judgment; and of that opinion was the whole court; and said, that this point has been often determined since the case in 1 Saund. 228. Vide 1 Rol. Abr. 111. p. 5. T. Raym. 176. 5 Mod. 408. Cro. Car. 239. Latch 80, 262.

F. N. B. 260.
Writ of conspiracy.

Easter Term

21 Geo. 2. 1748.

Morrough *versus* Comyns. B. R.

GARNEY, one of the captors of a prize ship being intitled to a certain proportionate share of the goods taken (which have since been sold by the ship's agent) on the 24th of August 45. made a bill of sale of his share to the plaintiff, who brought an action against the ship's agent Comyns for money received for use, and upon the general issue there was a verdict for the plaintiff. And it was now moved for a new trial, and objected that the time of making the bill of sale, Garney had nothing in the case that he could grant or assign, because the statute 17 Geo. 2.

A captor of a prize assigns his share therein before condemnation, and held he could legally do it.

fo.

fo. 693, 4. which gives these prizes to the captors, says, that they shall be divided amongst the captors as shall be agreed on by the owners, being first deemed lawful prize, and this was not deemed lawful prize until September 1745. which was after the making the bill of sale.

It was insisted by Sir Richard Lloyd and Mr. Ford for the plaintiff, that the statute gives the property of the prize to the captors instantly upon the taking thereof, and that the sentence in the Admiralty only confirms that property.

2 Ro. Abr.
399.
Relation.
2 Leon. 196.
Anonym.

If a man delivers a deed as an escrow to be delivered to the grantee, when the bailee has delivered it, it has its effect from the first delivery. So if a bargainee of lands before inrollment makes a grant of the lands to another, and afterwards the first deed of bargain and sale is inrolled, it is good. 2 Inst. 675. Cro. Jac. 52. Hob. 220, 221. for whenever two things are necessary to be done to perfect a deed, &c. when those two things are done the deed shall be effectual from the doing the first act; this is always true in the case of prizes. So in the case at bar, after sentence of condemnation in the Admiralty the property of the prize must be considered as absolutely and legally vested in the captors from the instant of taking thereof, between *Landen v. Pickering*, Mich. 18 Geo. 2. B. R. there was a warrant of Attorney to confess judgment, and a release of errors in the same deed, and it was held that the release should operate upon that judgment when entered, and that the judgment should be considered as prior in time.

2 Stra. 1215.

If a man to day conveys land the property of another, and tomorrow gains the property thereof, he shall be estopped to say he had nothing in the land when he granted it.

On the other side it was insisted by Mr. Hume Campbell, Mr. Holey, and Mr. Comyns for the defendant, that every prize taken by privateer from the King's enemies, is, by the law of nations his majesty's property, which, by a public law, he has been pleased to give to the captors in a particular manner, viz. being first deemed lawful prize, so that all the right the captor has, is by the statute. That although the plaintiff by the assignment of Garney might have an equitable right, yet he had not a legal one, for no man can make a legal conveyance of that which he has not at the time of making it. Co. Lit. 265. So in the case of a will, if a man devises all his lands and after the making his will purchases others, those lands after purchased shall not pass.

If two jointenants be of certain lands, and one of them by indentured bargains and sells the lands, and the other jointenant dies

and then the *deed* is inrolled, there shall pass nothing but the *moiety*, which the *bargainor* had at the time of the bargain. *Co. Lit.* 186. a.

And although in the case of a *bargain and sale* the estate vests in the bargainee *ab initio*, as soon as the *deed* is inrolled, yet *that* is by the *stat.* 27 Hen. 8. of uses, which doth join all the estates to the *uses ipso facto*; the *stat.* of *inrolments* only says, that the estate shall not vest except the *deed* be inrolled; so that if it be inrolled it doth vest, not by the *statute of inrolments*, but by the *statute of uses presently*; yet it was agreed that the bargainee cannot sell unto another, before his own *deed* be inrolled; as was adjudged in *Bellingham's* case. *Hob.* 136.

An estate vests in the bargainee by the statute of uses, not by the statute of inrolments.

Q. Cro. Jac. 52. and 2 Leon. 196.

Lee C. Justice: I was of opinion at the trial, that this action well laid for the assignee of the captor against the defendant who was the ship's agent, and the whole court is of the same opinion now; for the words in the statute, being first deemed lawful prize, are no more than what would have been implied if they had not been inserted; it is no condition precedent, for whenever the ship is deemed lawful prize by the court of Admiralty, the property must be considered as immediately vested at the instant the ship was taken.

Wright Justice: At common law the subject in time of war was entitled to the property of whatever he could take from the King's enemies, and we are to be governed by *that*, and not by the law of nations; and to prove *this* I shall cite the best books of authority. *Regist.* 102. b. *Bro. tit. Property*, pl. 18, 38. So the court refused to grant a new trial, and ordered the *posse* to be delivered to the plaintiff.

Case in temp. W. 3. 135. King and Brown.

The subject in time of war is intitled to the property of what he takes from the enemy, by the common law.

N.B. By the *stat.* 20 Geo. 2. fo. 593. These bills of sale of prizes before condemnation are made void.

Moor and Lynch. In Error. B.R.

THIS was error upon a judgment in debt on a bond in the penalty of 1470*l.* Mr. Ford for the plaintiff in error moved to justify bail, each in 1470*l.* Sir John Strange on the other side insisted that the bail ought each of them to justify in double the sum the judgment was given for; but *per curiam*, The sum recovered is double the debt really due, and, it is sufficient for the bail to justify each in the sum of 1470*l.*

Bail in error on a judgment in debt on a bond, each bound in the sum recovered, it being double the sum due.

Musgrave, on the demise of Hilton, *versus* Sir John Shelley. B. R.

Plaintiff's lessor enters, afterwards defendant levies a fine, then an ejectment is brought, and the demise laid before the fine, and well enough.

AT a trial at bar in ejectment the lessor of the plaintiff proved an actual entry into the lands made by him the 7th of September 1744. and the demise in the declaration is laid on the 1st of October 1744. It was objected for the defendant that he had levied a fine of the lands in Easter term 1745. since which time this ejectment was brought, and that to avoid that fine the entry of the plaintiff's lessor in September 1744. is not effectual; but *per totam curiam*, The lessor, by his entry in 1744. gained to himself a title sufficient to enable him to make the lease in the declaration to have his title tried.

Rex *versus* Haines, for an assault and maihem. B. R.

The benefit of the act of grace allowed to a defendant after he had omitted to pray it at his trial, on payment of full costs.

AN information of Easter term last; upon Not guilty pleaded, was tried at the last summer assizes for the county of Worcester, when the defendant did not think proper to pray the benefit of the late act of grace, whereupon the judge proceeded to try the information, and the jury found the defendant guilty, who in Michaelmas term last moved that he might have the benefit of the act upon payment of costs.

Mr. Bathurst for the King objected, that as the defendant did not think fit to pray the benefit of the act of grace at the time of the trial, he came too late; and cited *Hawk. P. C. Lib. 2. c. 37. §. 59. Kelyng 24. 25. Jenk. Cent. 129. Hales 8. 252. and Ratcliffe's case ante*, wherein the court refused to let him plead the act of grace after he had pleaded he was not the same person who was tried and convicted for high treason in the year 1715.

Mr. Evans for the defendant said he pleaded Not guilty in Trinity term, and the act of grace did not pass till the end of it; and that the practice of the Old Bailey is to plead guilty, and then to pray the benefit of the act, which a man has no occasion for before he has confessed himself, or been found guilty by the jury.

The court took time to consider until this term; and now were of opinion that the defendant was intitled to the benefit of the act of grace; but ordered that he should pay the prosecutor full costs out of pocket, and gave particular directions to the master accordingly.

The Bishop of Meath *versus* Lord Belfield. In Error.

QUARE *impedit* brought in the *Common Pleas* in *Ireland*, where-
 in Lord *Belfield* was plaintiff, and the *Bishop of Meath* de-
 fendant; the title made by the plaintiff in his declaration is, that
 the *Earl of Roscommon* was seised in fee of the *advowson* of the rec-
 tory of the church of *C.* in the diocese of *Meath* in gross; and being
 so seised presented one *Nicholas Knight* as his clerk, who was insti-
 tuted and inducted in the year 1696. that in the year 1707. Lord
Roscommon granted the *advowson* to an ancestor of Lord *Belfield*,
 under whom he derives his title; that upon the death of a former
 incumbent Lord *Belfield* not presenting in time, the *Bishop of Meath*
 presented *Benjamin Hogshaw* by lapse, who being now dead, the
 plaintiff below says he presented *A. B.* as his clerk, but the *Bishop*
 refuses him.

Evidence.
 Where a
 blank is left
 in the Regi-
 ster of an in-
 stitution or
 collation for
 the patron's
 name, parol
 evidence of
 common re-
 port to prove
 who was the
 patron is ad-
 missible.

The *Bishop* pleads he is intitled to the *advowson* in right of his
Bishoprick, and that the late *Bishop* collated *Hogshaw* as his clerk;
 that *Hogshaw* being dead, he collated *Smith* the present incumbent
absque hoc; that the late *Earl of Roscommon* was seised in fee, where-
 upon issue was joined; so the single question to be tried was, whe-
 ther the *Earl of Roscommon* was so seised; and in order to prove it,
 Lord *Belfield's* counsel at the trial produced the *Bishop's register book*
 of the year 1696, in which the institution of *Knight* was entred,
 whereby it appears that *Knight* was instituted *ad rectoriam præ-*
dictam per resignationem Johannis Twelves, but there is a blank left
 for the name of the *patron*, and in this instrument in the book
 there are these words, *nominamus ordinamus facimus admittimus &*
instituiamus N. Knight ad rectoriam prædictam una cum omnibus mem-
bris curamq; animarum, &c. it not appearing clearly who was the
patron, because of the blank for his name; the Lord *Belfield's* coun-
 sel offered to support their case by *parol* proof that it had always
 been the common reputation of the country that the *Earl of Roscom-*
mon was seised of the *advowson*, and presented *Nicholas Knight*; to
 which the *Bishop's* counsel tendered a bill of exceptions, which was
 sealed by the judge who tried the cause, which was afterwards ar-
 gued, and judgment was given for Lord *Belfield*, which the *King's*
Bench in *Ireland* has affirmed, and now a writ of *error* is brought
 here. It also appears upon the face of this record that in the time of
King William 3. there issued a commission to the *Bishop of Meath* to
 enquire and certify what clerks were incumbents, &c. within the
 diocese, and by the *Bishop's* certificate or testimonial it appears that
Nicholas Knight was incumbent of this church on the institution or
 collation of somebody, but it doth not appear upon which, or by whom.

This

This question, whether the *parol* evidence excepted to, be *legal evidence* to prove a *seisin in fee* in Lord Roscommon, or be admissible under the circumstances of this case, was argued by Mr. Joddrel for the Bishop, and Sir Thomas Bootle for Lord Belfield, and after time taken to consider, Lee Ch. Justice, Wright, and Dennison, agreed that it was admissible; Foster Justice *contra*.

By three Judges, *instituimus* is a very ambiguous word, and there are many cases shew it to be as well applicable to a *collation*, as an *institution*, so that the entry in the *registry* was some evidence of an *institution*, as well as of a *collation*, and is strengthened something by the *commission* and *certificate* in the time of W. 3. the return whereof was made from the *registry*; therefore as this written evidence might be either an *institution* or a *collation*, surely the *parol* evidence was very proper to shew *which* it was, and being a matter *sub judice*, was fit to be left to a jury; and judgment for Lord Belfield was affirmed.

Goodall's Case. B. R.

Serjeant in the guards cannot be arrested under 101.

GOODALL, a *serjeant in the guards*, was arrested in the *palace court* for a less sum than *ten pounds*, and being brought here by an *habeas corpus*, was discharged out of custody upon the *mutiny act*; for *per curiam*, A *serjeant* is enlisted as a volunteer, and is only a *serjeant* by *parol* of the *colonel*, and is reducible to a private man whenever the *colonel* pleases, so cannot be arrested under 101.

Townsend versus Ives. At the Rolls, May 9, 1748.

All the three witnesses to a will must be examined if living.

THIS was a bill preferred by the legatees under the will of John Townsend, in order to have his real estate sold for payment of their legacies, which are charged thereupon, against the heir at law of the testator who is an infant, and to have the will established. There were *three* witnesses to the will *all* now living, but only one has been examined, who proved the execution of it, and the attestation of the other *two* witnesses. But his Honour refused to establish the will without the examination of all the witnesses, for it is a rule that *all* the witnesses if living must be examined to prove the will; besides the heir at law is, in this case, an *infant*, who if of age, has a right to cross-examine all the witnesses, and as no admission of this sort can be received for an infant, this court must protect his right and therefore must insist upon all those requisites which he would have a right to insist upon if he were of age, and capable of making a defence for himself.

Trinity Term

21 & 22 Geo. 2. 1748.

Ramsden and another *versus* Macdonald. B. R.

THE defendant being a native of *Great Britain*, in the year 1740. was a *banker* at *Paris*, and upon *May 31, 1740.* executed a bond to the plaintiffs in the penalty of 2000*l.* conditioned for the payment of 1000*l.* in *May 1742.* and being so indebted came into *England*, and has been lately convicted and attainted of *high treason*, and being in prison under such conviction and attainder, on the *26th of March* last an *affidavit* was made that the defendant is indebted to the plaintiffs for principal and interest on bond in the sum of 1200*l.* and thereupon application was made to Lord Chief Justice *Lee* for leave to charge the defendant in custody with a writ at the suit of the plaintiffs, who granted leave accordingly.

One attainted of treason may be charged with a civil action.

And in last *Easter* term it was moved for the defendant by Mr. *Attorney General*, Sir *John Strange*, and Mr. *Solicitor General*, that the defendant might be discharged out of the custody of the Sheriff of *Surry* as to this action at the suit of the plaintiffs; upon a suggestion that *this* was an infringement of the King's *prærogative*, for that the King intended to pardon *Macdonald* upon condition of his transporting himself out of his Majesty's dominions and never returning again, and that it was impossible for him to perform the condition if the court should suffer him to be thus charged by the plaintiffs; the court made a rule to shew cause, and this term cause was shewn against the defendant's being discharged by

Mr. *Henley* for the plaintiffs: It was insisted, *last term*, that the King had power over the defendant's body and goods; but it appears by Lord *Coke's 3 Inst. 215.* that although judgment be given against a man in case of *treason*, yet his body is not forfeited to the King, but until execution remains his own; and therefore if he be slain before legal execution, his wife shall have an *appeal*, so that he cannot be said to be *civiliter mortuus*, for he may purchase lands to himself and his heirs, may be charged in *execution* at the suit of a *subject*,

1 Sid. 90.

211.

T. Raym. 58.

K k k

and

and shall be compelled to answer at other mens suits, and shall not be permitted to plead the *attainder*; this does not at all affect the *prærogative* of the crown, for the King may pardon *absolutely* or *conditionally*, but not *conditionally* so as to hurt an innocent creditor. In the case of *Bannister v. Trussel*, *Cro. Eliz.* 516. it is determined that one *attainted* could not plead his *attainder* in an action of debt, but was obliged to answer, by *three* judges against *one*, which opinion has ever since been adhered to. 1 *Sid.* 159. 1 *Keb.* 649. *Sir Cha. Stanley's case* 723. *Noy* 1. *Moor* 753.

Foxworthy's case, *Salk.* 500. was relied upon for the defendant; but it is very different from the case at bar; *Foxworthy* came to the bar and pleaded his *pardon*, which was allowed, whereupon some of his creditors that instant moved for leave to charge him with actions; the present case is of a person regularly charged before any *pardon* be pleaded, *Foxworthy's pardon* being allowed, he was no longer in custody of the *Marshal*, so could not be charged.

Wile 1 Lev.
124, 146.

It is objected the *pardon* is not for the benefit of creditors; but this I deny, for by the operation of law it is clearly for their benefit.

Dyer 245.

It formerly used to be a trick for persons greatly indebted to get themselves indicted for some crime within the *benefit of clergy*, to defeat their creditors by pleading they were *attainted*, and so not obliged to answer, but it has ever since been held, that a person *attainted* may be sued.

This court will permit *bail* for a defendant in a *civil suit* (who becomes *attainted*) to bring him into court by a *habeas corpus*, and to surrender him to the *Marshal* for a moment in discharge of themselves, and then will remand the criminal to *Newgate*, as was done in the case of the *bail of Peter Burgoyne*.

Lee Chief Justice: There is no doubt but a person *attainted* may be sued; leave has been given by me to charge the defendant, and therefore you must move to discharge my *order*, before you can do any thing, for while *that* stands the defendant is regularly charged; therefore the present rule to shew cause why the defendant should not be discharged at the plaintiff's suit must be discharged, which was so ordered *per totam curiam*.

Ryley *versus* Parkhurst and two others. B. R.

TRESPASS for taking and impounding the cattel of the plaintiff at *Teddington* in the county of *Middlesex*. All the defendants plead the general issue, and thereupon issue is joined. Two of the defendants plead another plea, (without saying by leave of the court) that one of them is seised of a certain close at *Kingston* in *Surry*, and the other as his servant, and justify the taking the cattel there *damage feasant*, and that they drove them to, and impounded them at *Teddington*, as it was lawful for them to do. The plaintiff demurs, and therein says that the plea is uncertain, informal and double, but does not say what the *duplicity* is.

Trespass at
Teddington;
defendant
justifies for
damage fea-
sant at King-
ston, and that
he impounded
the cattel at
Teddington
good without
a traverse.
Duplicity in a
plea must be
pointed out.

Lawson for the plaintiff: 1st, This is a double plea, for the general issue is an answer to the whole declaration, and the other plea is not said to be *with leave of the court*.

2^{dly}, The *damage feasant* is *local* and the defendants ought to have traversed the taking and impounding at *Teddington*, or any where else than at *Kingston*. *Cro. Eliz.* 705. 2 *Lutw.* 1435. *Benjamin v. Howell*, *Mich.* 18 Geo. 2. ante 81.

Serjeant Bootle, contra: As to the 1st objection, *Bartholomew v. Ireland*, *Mich.* 11 Geo. 2. B. R. *Trespass* for breaking and entring plaintiff's chambers in *Staples-Inn*, the defendant pleaded several pleas without saying by *leave of the court*, which was shewn for special cause of demurrer; but the court only said it was an irregularity, and held it good on a demurrer, Sir *John Strange* was for the plaintiff, and *myself* for the defendant, who had judgment, and the *duplicity* must be pointed out by the demurrer, which is not done here. *Salk.* 219. *Comyns* 115.

As to the 2^d objection: The *justification* is a good answer without a *traverse*, for the impounding at *Teddington* is a detaining and taking at *Teddington*, and to have *traversed* the taking at *Teddington* would have been a good cause of demurrer; or if issue had been joined on such a *traverse*, the defendants must have been gone for the reason aforesaid; and of this opinion was the court in both points, and judgment for the defendant *per totam curiam*.

Vide post.
Ter. Mich.
8 Geo. 3.
Walton v.
Kersop.

Smith on the demise of Taylor *versus* Mann. B. R.

In ejectment where the landlord is made defendant the plaintiff must prove his the defendant's tenant in possession of the premises in question.

EJECTMENT for three houses at *Deptford* in *Kent*; the case reserved at *Nisi prius* for the opinion of the court was thus stated, *viz.* That *Richard Mann* in 1741. demised the premises to *A. B.* for 500 years by way of mortgage, to whom the plaintiff's lessor is executor; the mortgage becomes forfeited, and this *ejectment* being brought, the defendant obtained a rule to defend as *landlord* in case the tenant did not appear; and at the trial it was insisted upon for the defendant, that the plaintiff ought to prove that the defendant or his *tenant* was in possession of the premises in question, and failing in *that*, M. Justice *Burnett*, who tried the cause, was of opinion the plaintiff had failed in proving his case, but reserved it for the opinion of the court; and now upon debate it was held clearly *per curiam*, That it was necessary to prove the defendant or his *tenant* in possession of the premises, for the rule is, that the *landlord* shall defend for the premises only whereof his tenants are in *possession*, and the party does not admit himself to be *landlord* of any premises which the plaintiff may make title to, but of such only as were in possession of those *tenants*. The *postea* was ordered to be delivered to the defendant.

Jeffreys *versus* Walter. B. R.

Cricket is a game within the 9 Annæ, and a bond given as a collateral security by a third person for money won at it, is void.

DEBT upon a bond; the defendant craves *oyer* thereof, and sets out the *condition*, that whereas one *J. Parsons* by bond of the same date is bound to the plaintiff in the penal sum of 1000*l.* to pay him an annuity of 100*l.* *per annum* at the four usual feasts during their joint lives; now the condition of this obligation is such, that if *J. Parsons* during the joint lives of him and *Jeffreys* shall pay him the annuity, then this present obligation to be void, otherwise to remain in force; *quibus lectis et auditis*; the defendant says he ought not to be charged, because he says that after the 1st of May 1711. and before the making the said bond, *viz.* such a day and year, certain persons unknown to the defendant, who stiled themselves of the county of *Kent*, played against certain other persons who stiled themselves *all England*, at a certain game called *cricket*, and that the plaintiff won of *Parsons* 25 guineas on a *bett upon tick* upon the said game, and also won of him a second *bett* upon another game of *cricket* played between the same persons, the sum of 25 guineas upon tick; and that thereupon it was agreed between the said *Parsons* and *Jeffreys*, that if the said *Jeffreys* would advance to the said *Parsons* 447*l.* 10*s.* to make up the two lost *betts* 500*l.* he the said *Parsons* would give him the said recited bond to pay him an annuity

of 100*l.* a year during their joint lives, and the defendant avers that the present bond was given by him to the plaintiff (*as a collateral security*) for money won at play, and that it is void by the statute. Plaintiff demurs, and defendant joins in demurrer.

It was argued for the plaintiff that *cricket* is not a *game* within the meaning of the *stat. 9 Annæ*, and 2*dly*, That the present bond was not given for money won at play, whatever the bond given by *Parsons* might be.

For the defendant it was insisted, that *cricket* is a *game* though not mentioned in the statute, and comes under the general words, *or any other game or games whatever*; it is, (to be sure) a manly game, and not bad in itself, but it is the ill use that is made of it by betting above 10*l.* upon it that is bad and against the law, which ought to be construed largely to prevent the great mischief of *excessive gaming*.

If *Parsons's* bond be void, there is no doubt but the defendant's bond is so too, for which was cited *Salk. 344.* a case put by *Holt C. J.* as in point. The court inclined to give judgment for the defendant that *cricket* is a *game*, and that the present bond is void; but it stood over for further argument and the parties agreed, *ut audiavi.*

Price *versus* Griffith. B. R.

MR. *Phillips* moved to change the *venue* from *Bristol* into *Glamorganshire* upon the common affidavit, and cited *Tindale v. Gwynne* in *Trinity* term last, wherein there was a rule to shew cause why the *venue* should not be changed from *London* to *Carmarthen*, which was made absolute the last day of that term upon an affidavit of service when the court was full. But now *Dennison* and *Foster* justices (being only in court) refused to make a rule to shew cause, and desired Mr. *Phillips* to stir it again when the court was full, that the matter might be fully considered, for it was of great consequence.

Quære, whether the venue can be changed by the court of B. R. into Wales.

The next day Mr. *Phillips* moved it again, when *Lee C. J.* *Dennison* and *Foster* were in court, and made a rule to shew cause, but declared it should not be made absolute without hearing the other side.

And now Mr. *Evans* came to shew cause, and insisted that as this court could not try it in *Wales*, the *venue* ought not to be changed, and if the court should think fit to change the *venue*, yet the

cause must be tried in an adjacent county; that the court of Exchequer constantly refuse to change the *venue* into *Wales*.

Mr. Phillips *e contra*: If the *venue* be changed it may be tried *de vicineto*, viz. in the next adjacent county to Glamorgan, and this court cannot be ousted of *jurisdiction into Wales* but by plea. Chapman v. Maddison, Pas. 12 Geo. 2. and the defendant cannot now plead in *abatement*, the time for pleading a dilatory being now expired, and the defendant by this application admits the *jurisdiction*; this court may send the record to be tried in the next adjacent county, and if the *venue* cannot be changed into *Wales*, great inconvenience will ensue, for a poor *Welshman* may be drawn from his own country to defend himself in the most remote county in England.

Per curiam, The case of Tindale v. Gwynne passed *sub silentio*; this is a matter of great consequence, and must stand over to be considered.

The venue has been frequently changed into counties palatine. 2 Stra. 807. *contra*.

N.B. It was said by Sir John Strange in the case of Tindale v. Gwynne, that the Exchequer frequently change the *venue* into *Wales*, and that in Markham v. Norton this court changed it from Cumberland into Lancashire, Pas. 8 Geo. 2. and in Gowan v. Falkner, 9 Geo. 2. this court changed it from Middlesex to Cheshire; and in 2 Ld. Raym. 1418. it was changed into Cheshire, for this court can send down the record by *mittimus* to be tried in the next adjacent county; but Sir John admitted that in Moore v. Fernyboagh this court refused to change the *venue* from London to Carmarthen.

Rex versus Ellers. B. R.

A person indicted for insulting a justice of peace shall not be discharged from the prosecution altho' the justice be dead.

THE defendant was indicted for insulting Mr. Burdus a justice of peace in the execution of his office. Mr. Recorder of London moved that the defendant's recognizance might be discharged upon an affidavit that Mr. Burdus was dead, and that the defendant has been in gaol ever since October last. Mr. Attorney General opposed this; *per curiam*, This is a matter well becoming the government to prosecute, and the defendant must either plead Not guilty, or confess the indictment; so he pleaded Guilty, and submitted to the judgment of the court.

Waters *versus* Bovell. B. R.

TRESPASS; the defendant justifies for toll at *Hounslow*, and pleaded two pleas in *Hilary* term last; and in this term, after issue joined, obtained a rule to shew cause why he should not have leave to amend his two pleas, and to add a third plea. Upon shewing cause Mr. *Ford* objected to adding the third plea, because it was now *two* terms since the defendant pleaded; and compared it to the course of the court not to give a plaintiff leave to add a count after *two* terms. But *per curiam*, (*absente Wright J.*) The rule must be absolute upon paying costs, both as to amending the two pleas, and adding a third; for there is no time limited for application to the court to plead several pleas; the reason why a plaintiff must apply for leave to add a count within *two* terms, is because he is obliged to declare within *two* terms, otherwise he will be out of court, and a new count is considered as a declaration; and the plaintiff's being refused after *two* terms to add a count, is not under such difficulty as the defendant would be if he were refused to add a plea after *two* terms, because the plaintiff may have a new action. Serjeant *Draper* for the defendant.

Leave given to add a plea after two terms since the first pleas were pleaded.

Lord Brooke *versus* Stone. B. R.

DEBT upon a bail-bond; the defendant the bail * has pleaded that the bail-bond was really executed after the return of the writ, whereby the principal defendant was arrested, and that the bond is dated before the day it was executed, and is void by the statute. The plaintiff demurred, and defendant joined.

To a bail-bond, the defendant pleads it was taken after the return of the writ against the principal. Demurrer.

A side bar rule for the sheriff to return the writ against the principal defendant having been obtained upon a supposal that the bond is bad; it was now moved that the side-bar rule might be discharged, because the plaintiff has had an assignment of the bail-bond.

* In the bond to the sheriff.

The plaintiff shall not have a rule for the sheriff to return the writ against the principal defendant before it be determined whether the bond be good or not.

Per curiam, If a plaintiff accepts an assignment of a bail-bond, he cannot have a rule for the sheriff to return the writ; at present it remains to be determined whether the bond taken be good or not, and for any thing that yet appears to us the bond may be good, and if it be so, the plaintiff's taking an assignment thereof amounts to a return of the writ, and therefore you come too soon to move to discharge the side-bar rule; so let it be enlarged until it be determined whether the bail-bond be good.

If a plaintiff accepts an assignment of a bail bond, he cannot call upon the sheriff to return the writ.

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N. The defendant in his plea avers that the writ was returnable the 23^d of June, and that the bond was taken and executed afterwards, and traverses that it was taken before the return of the writ.

Pawlet *versus* Pawlet. In Chancery.

A father having a power to appoint portions to younger children, to be raised at all events, in such shares as he shall think fit, cannot annex a condition to the appointment of any child's share.

LORD Pawlet having a power under his marriage-settlement of distributing 30000*l.* which was settled for his younger childrens fortunes, in such shares and proportions as he should think fit, appointed 29900*l.* to his son *Ann Pawlet*, subject to the devises in his will, and directed the other 100*l.* to be equally divided amongst his younger children.

Per Lord Hardwicke : This is void as an appointment, because where a father has only a power of appointing or distributing portions, which are to be raised in all events, in such shares and proportions as he shall think fit, he cannot annex any condition to the payment of any share which he appoints; and if such condition annexed is for the father's own benefit, it will then have the appearance of fraud, therefore this court will look upon such appointment to be void; otherwise it is where the portions are not to be raised at all without the father's appointment, for there the father may annex a condition. Where the appointment to a particular child is evasive and il'usory, this court will set it aside, and will not allow such inequalities to be made amongst children, as appear to be unconscionable and unreasonable. However in the present case the parties in this cause having agreed to abide by Lord *Pawlet's intention* and *will* so far as could be collected; the decree was made accordingly.

Dunstan and his Wife *versus* Burwell & al'. B. R.

Joinder in action. Wherever the suit will survive to the wife she must be joined.

DEBT for a penalty in articles of agreement made between the plaintiffs and defendants, whereby the defendants agree, under a certain penalty, to grind all their corn and grain at the mill of the plaintiffs, and this penalty is agreed to be paid by the party offending to the parties offended or injured. Upon a demurrer to the declaration, Serjeant *Bootle* objected for the defendants, that the wife of the plaintiff ought not to join in this action.

But on the other side it was said by Mr. *Ford*, that it is stated in the declaration that the mill is the mill of the husband and wife, and that the action would survive to her, and the agreement is expressly with them both; and that it is a general rule that in every case where the action will survive to the wife she must be joined, and both

both the plaintiffs are injured; and of that opinion was the whole court, and gave judgment for the plaintiffs.

Doe versus Carleton. B. R.

IN *ejectment* a special case made at *Nisi prius* for the opinion of the court.

Richard Lee being seised in fee of the lands in question, and having only one child *Henry* his son and heir unmarried, in 1700. made his will, and devised his lands in these words, *viz.* "I give devise and bequeath unto *Jane* my now wife, the right of all my messuages and tenements, both lands and leases not made unto her in jointure, to be by her received and enjoyed immediately after my decease for the term of three years, provided she continue so long sole and unmarried, and not otherwise. *Item*, I give, devise and bequeath, after the determination of the said three years, all that tenement called *A.* (which are the lands in question) to *Henry* my son during the term of fourscore and nineteen years, if he happen so long to live, and from and after the determination of that term, for and during one other term of fourscore and nineteen years, if such woman as shall be his wife shall happen so long to live, and after the said two terms, or the death of *Henry* and such woman as shall be his wife at the time of his death, then to the heirs of his body lawfully begotten, and the heirs of their several bodies issuing; and for default of such issue, to the said *Jane* my wife during the term of her natural life, and after her decease to *E. Lee*, son of *E. Lee* my brother, and his heirs forever."

Testator devises to his wife for three years, remainder to his only son for 99 years if he so long live, remainder to him for other 99 years if such wife as he shall marry so long live, remainder to the heirs of his son's body and their heirs of their bodies, remainder over in fee, the devise to the heirs of the son's body is a good executory devise.

Soon after the making his will the testator died seised, leaving *Jane* his wife and *Henry* his only son and heir; whereupon *Jane* entered into the premises, (being no part of her jointure) and received the rents for three years; then *Henry* the son entered and was seised, and afterwards married *Mary Watson*, and continued in possession till the year 1718. when he died, leaving *Mary* his wife, (who was possessed of the premises and died in 1721.) and two daughters by her, *viz.* *Elizabeth* the wife of *John Salter*, and *Mary Lee*, who are the plaintiff's lessors, and no other issue, who were both infants at the time of their mother's death, and within ten years after they came of age brought this ejectment; and the question is, whether the lessors of the plaintiff have a title under this will as heirs of the body of *Henry Lee*; which was twice argued at the bar, by Serjeant *Belfield* and Mr. *Ford* for the plaintiff, and Mr. *Henley* and Mr. *ould* for the defendant.

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It was objected for the defendant that the devise to the heirs of the body of *Henry Lee* was void, and that if it can take effect, it must be by one of these three ways; 1st, Either as a present devise; or 2^{dly}, as a contingent remainder; or 3^{dly}, As an executory devise.

1st, That it cannot take place as a present devise, because *Henry Lee* was not married at the time of the testator's death, and therefore there was no body to take; 2^{dly}, It cannot take effect as a contingent remainder, because there is no freehold to support it; and 3^{dly}, It cannot take effect as an executory devise, of which there are only three kinds; 1st, Where the devisor departs with his whole fee-simple, but upon some contingency qualifies that disposition, and limits a fee on that contingency; the 2^d sort is when the devisor gives a future estate to arise upon a contingency, but does not depart with the fee at present, but suffers it to descend to his heir; the 3^d sort are of leasehold interests or terms for years; and the present devise is none of these three sorts.

For the plaintiff it was admitted not to be a present devise, nor a contingent remainder, because there was no freehold to support it; but it was strongly insisted that the testator's intention was clearly to provide for his son and his issue, and if his intention can possibly take place by law it shall, and there is no way for it to take effect but by way of *executory devise*.

And now *Lee Ch.* Justice delivered the opinion of the whole court, that it was an *executory devise*, being to take place *in futuro*, and within the compass of lives in being; and the *postea* was delivered to the plaintiff.

Watson *versus* Richardson. B. R.

Pledges.

ACTION by bill; special demurrer shews for cause that there are no pledges to prosecute. *Ford* for defendant cited *Bro. tit. Bill*, p. 15. *Pledges* p. 11. *Dyer* 288. pl. 53. and many other cases. *Draper* Serjeant for the plaintiff: *Pledges* may be found at any time pending the suit; *Curia*, Will you move to amend and add pledges? Adjourned, and gave leave to move to amend.

Michaelmas

Michaelmas Term

22 Geo. 2. 1748.

Reech and Green, Executors of William Kenningale of Hitcham, *versus* John Kenningale, Executor of William Kenningale of Elmset. In Chancery.

WILLIAM Kenningale of Elmset having two nephews, the defendant John Kenningale and William Kenningale of Elmset, in 1734. made his will and John K. his sole executor, and committed to him the custody thereof. Eight years afterward on the 8th of November 1742. the testator being sick and weak, sent for the minister of the parish to pray with him, who, among other discourse he had with the testator, asked him if he had settled his worldly affairs, who answered he had not, but that he would send for his nephew John K. who had his will, to come to him the next day, and also desired the minister to come to him at the same time to assist him in making some alteration in his will in favour of his nephew William, to whom he recollected he had left nothing. Accordingly the next day the minister and the two nephews met all together in the room where the testator was lying ill in bed; after they had been together some time, the minister said, "If there is any thing for me to do it is time to go about it, for I am obliged to be gone elsewhere"; whereupon the nephew John K. produced the will, which was not sealed up in any cover, but open, and the testator desired the minister to read it over, who did so in the presence and hearing of the testator and his two nephews, whereupon his nephew William in a modest manner said, "Uncle you promised to give me 100 l." the testator answered, "yes, I did", and turning his face towards his executor John, desired him to pay William K. the 100 l. whereupon John promised the testator that he would pay William the 100 l. and told the testator that he need not make any alteration, or insert it in his will, for if William doubted his performance of the promise he would then give him his bond or note to pay it him, upon which the testator and William were satisfied, and no alteration was made in the will.

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The next day the testator died, and sometime afterwards *William* the nephew also died, and having made his will and the plaintiffs his executors they have brought this bill against *John K.* to be paid this 100*l.* setting forth the matter above stated.

The defendant put in several shuffling answers, but upon the whole he admitted he had the custody of the will, and that the parties all met at old *William's* house, and the minister read the will as in the bill; but says, that when the nephew *William* said, "Uncle you have given me nothing", the testator made no answer, but after *William* had repeated those words several times, the testator at length said to the defendant, "You may give *William* 100*l.*" to which the defendant answered, "he would do every thing that was just and right according to his will, and that Mr. *Haynes* (who was the minister then present) should know it". Then he goes on in his answer, and denies that the testator desired him to give *William* 100*l.* but believes he might say, "He would pay him 100*l.* or give his note or bond for it, but that he only made this offer to prevent *William* from importuning the testator, who was very sick and weak". Then he goes on in the same answer, and denies that he promised to pay *William* the 100*l.* or to give him his note or bond for it, and cannot say what words the testator used upon the said occasion of meeting, and is doubtful whether he was of sound mind; that the testator did not send him orders to bring the will, but desired him to bring it the next time he came to him; that he was generally at the testator's house every day when business did not hinder him, that he cannot form any belief as to the testator's intent to alter his will in favour of *William*, and admits he refuses to pay the 100*l.* as it is not inserted in the written will.

The plaintiffs proved the charge in the bill by Mr. *Haynes* the minister; the *apothecary* who attended him, proved the testator a day or two before his death declared he had not settled his worldly affairs, and another witness proved that about three months after the testator's death the defendant acknowledged to one Mr. *Stearn* that the testator had left *William* 100*l.* but that he should not be in a hurry to pay it him till the year and day was up; upon which Mr. *Stearn* asked the defendant if he would then pay it, to which he answered that upon his honour he would pay it then.

Lord Chancellor: This is a plain fraud upon the testator, and the plaintiffs might almost have heard the cause upon bill and answer, for although the defendant has shuffled in such a manner, yet he has in effect admitted the substance of the bill, and I would go as far as possible to fix the defendant personally; and if the promise or declaration after the testator's death had been made to *William* the nephew instead of Mr. *Stearn*, I would have decreed the defendant

defendant to have paid the 100*l.* out of his own assets, but I think that would be going a little too far as this case is; and if there be not sufficient assets, I cannot let the plaintiffs *in, pari passu* with the other legatees, for that would be to alter the written will; but I decree the defendant the costs of the cause until this time, and that an account be taken of the testator's personal estate, and the plaintiffs to be paid out of the residue, and reserve the consideration of subsequent costs.

Baldwin and Alder *versus* Rochford. In Chancery.

THE plaintiffs were *sailors* on board the *Prince Frederic privateer*, which took a great prize called the *Marquiss D'Antin*, the cargo whereof was chiefly gold, and carried her into *Kinsale* in Ireland; while they were in that harbour the two plaintiffs got on shore, and having there run into debt, sent to their captain to desire he would advance them ten pounds in part of their shares of the prize money, which he refused to do, and threatened to prick them as run away from the ship.

Contract with two sailors for the sale of their prize money set aside on the foot of imposition and public inconvenience.

The defendant knowing this and the circumstances they were in offered to buy their shares of the prize, at the same time representing to them the danger they were in of losing them, either in case they were prick'd by the captain as run away, or if the prize should happen to be retaken before she got to *England*, telling them the *Brest fleet* was out, &c. Whereupon and in consideration of 150*l.* paid to Baldwin, and of 130*l.* to Alder, they assigned their respective shares of the prize, and of what they might afterwards become entitled to, to the defendant; and it coming out that the plaintiffs' shares amounted to about 600*l.* a-piece, and that the defendant knew this, the plaintiffs have therefore brought their bill to be relieved against this bargain, upon the foot of *imposition* and public inconvenience, in case such bargains be suffered to stand, and set forth the matter as above, which was proved.

For the defendant it was insisted that he ran a great risque, for that possibly the shares might be less than what he had really given for them, and that before the prize could be got safely into some *English* port, there was both the danger of the seas and of the enemy, and if she was lost or retaken he would lose all his money.

Lord Chancellor: The general head of equity which the bill goes upon is *fraud* and *imposition*; and 1st, Here is a *presumption* of *fraud* arising from the circumstances appearing in the cause, and the great value of the thing sold in proportion to the small price paid for it; and although it is generally laid down both at law and in

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this court that *fraud* shall never be *presumed*, yet an *evidence of fraud* may arise from the circumstances and nature of the contract.

2dly, Here is *actual fraud* proved, and appearing upon the face of the bargain.

And 1st, Here is an *evidence of fraud* appearing upon the circumstances of the contract, from the inequality of the price to the value of the thing sold. If the plaintiff *Baldwin* was a quarter-master (as it seems he was) it is admitted his share will be about 900*l.* if he was only a common man 600*l.* and the other plaintiff's share is about 400*l.* So that one plaintiff has sold his share for about a *fourth*, and the other for little more than a *fourth of the value*. In the cases of *marriage brocage bonds*, *contracts with young heirs*, &c. this court constantly sets aside such bargains, upon the principles of public policy, and because of the great inconveniencies such contracts would be to the public if they were suffered to be valid.

There cannot be a more useful set of men to the public, nor a more unthinking sort of people than *common sailors*, who as soon as ever they get on shore, for the sake of a little immediate pleasure are willing to part with their right to any thing in *expectation*, for a very little in *possession*; and this is the sense of the legislature, both from the *stat. 1 Geo. 2.* and the *20 Geo. 2. c. 24.* whereby they have taken notice of them as a set of men not fit to take care of themselves, and therefore have taken care of them against themselves. I do not say that every *contract* with a sailor is void, or ought to be set aside, but every *contract* with them must be *fair*. A *sailor* shall not be held to bail for less than 20*l.* and therefore no body will lend one of them 20 shillings unless he gives his note for 20*l.* which none of them ever refuse, and do it every day in *Wapping*, which shews what I have before said to be true, that they will do any thing for a little ready money to enable them to take their pleasure.

Morrrough v.
Comyns, ante.

It has lately been determined that assignments of this kind are good at law, and give the assignee a legal demand against the agent for the ship for money received for the assignees use, though a court of equity might relieve in some cases; but this I think was going a great way, and the *stat. 20 Geo. 2.* was made to prevent the expense of suits in equity.

As to the inequality of the price paid, it is said for the defendant *that* can be no reason to set aside the contract, considering the risque he ran of losing his money; and although by the *Roman law* the contract was void when the *price paid* was not *half the value* of the thing sold, yet *that law* was never established in *England*, nor does our law fix any certain proportion that the price shall bear to the thing.

In answer to this, I think *that* alone without any other matter appearing in the case would not be a reason to set aside the contract in this case, but taking all the circumstances together, (*and juncta jure*) that it appears the defendant had made inquiry into the value of the shares, and applied for that purpose to the captain, had told the plaintiffs they were in danger of being *prick'd* run away, and alarmed them with the danger of enemies and the sea, shews plainly there was *imposition*; so it appears the defendant most probably knew the value of the shares better than the plaintiffs, for though one of them was a quarter-master, yet it doth not follow from thence that he knew the value, for the head officers endeavour to keep *that* a secret as much as possible from every body in the ship, for reasons obvious to any one. As to any hazard the defendant might run that is nothing, because it appears the shares were insured at 4*l.* per cent. from *Kinsale* to *London*.

2dly, The *assignment* itself is pretty extraordinary; it is, "All and singular such shares of pay, wages, bounty money, prize money, plunder money, and all monies as now are, or hereafter shall be payable to me out of the *Prince Frederic and Duke privateers*:" Now the plunder money is a distinct thing, and might take in what these persons might be intitled to by going in these privateers at any time afterwards; this shews a bad intention in the defendant, and that plaintiffs did not mind what they were doing, and that the defendant was very sharp, and is some evidence of *actual fraud*.

Upon the whole the plaintiffs must be relieved; and therefore I order the *assignment* to be set aside, but not so absolutely, but that it shall stand as a security for what is due to the defendant *Rochford*, and that he shall only have his principal money with interest at 5*l.* per cent. and that the managers of the prize shall pay the plaintiffs the rest of their shares, that *Rochford* shall pay plaintiffs their costs as between them and him till this time, and that the plaintiffs shall pay the managers their costs to this time.

Van Morfell *versus* Julian. B. R.

THE plaintiff being a merchant at *Amsterdam*, and the defendant residing at *London*, indebted to him in a large sum of money; the plaintiff made oath of his debt before a *Burgo-master in Holland*, who certified an account thereof to the plaintiff's agent here who makes an affidavit that he believes the said oath and account current are true, and thereupon sues out a writ and holds the defendant to special bail; and now Mr. *Evans* moved that common bail might be accepted, insisting that this is not a *positive affidavit* of the plaintiff's *cause of action*, which the *stat. 12 Geo. 1.* requires for this

There must be a positive affidavit of the cause of action to hold defendant to special bail.

2 Stra. 1157, 1209, 1226, 1219.

this purpose. Mr. Ford for the plaintiff cited *Loveland v. Bassett*, Trin. 16 Geo. 2. where an assignee of a bond swore that the obligor was indebted in 90*l.* for principal and interest upon the bond, as he believed; and it was held sufficient to hold the defendant to special bail.

Per curiam, A positive affidavit of the cause of action is always required, and affidavits going only to belief have often been held insufficient; and in the case cited by Mr. Ford there was something more than in the present case, for the assignee had the bond in his own custody, which of itself was some evidence of the debt, and the presumption must be that it was not paid as the bond was not cancelled or given up to the obligor. So the rule for common bail was made absolute.

Reynolds versus Kennedy. B. R.

If the condemnation of goods for not entering and paying duty, by sub-commissioners, be reversed by the commissioners of appeal in Ireland, an action for a malicious prosecution does not lie against the informer, for the judgment of the sub-commissioners shews there was a foundation for the information and prosecution.

ACTION upon the case for a malicious prosecution brought in the King's Bench in Ireland; the declaration sets forth that the defendant upon such a day and year, with an intent to injure and oppress the plaintiff, at such a place, in the hold of a certain ship called the *unity*, the property of the plaintiff, and under the hatches of the said ship, unjustly seized and detained sixty-one hogheads of brandy, the property of the plaintiff, and removed it into the King's storehouse; that the defendant exhibited an information against the plaintiff before the sub-commissioners of excise to oppress the plaintiff falsely and maliciously, alledging that the said sixty-one hogheads of brandy were brought into Cork in the said ship, and were intended to be carried away again without due entry first made, or payment of the duty; that the sub-commissioners condemned the brandy, but upon an appeal to the commissioners of appeal they most justly reversed the judgment of the sub-commissioners, and ordered the brandy to be restored to the plaintiff, whereby the plaintiff has been put to great costs and damages, and therefore brought this action; the defendant pleaded Not guilty, and the jury upon the trial gave a verdict for the plaintiff, and 37*l.* 17*s.* 10*d.* damages. But the court of King's Bench in Ireland have given judgment that the plaintiff shall take nothing by his bill, and that the defendant may go without day; that is to say, they have arrested the judgment. The plaintiff has brought a writ of error, and the error assigned is that the King's Bench in Ireland ought to have given judgment for the plaintiff upon the verdict.

This case was twice argued at the bar; and this term the Chief Justice delivered the opinion of the whole court.

Lee Ch. Justice: I shall first premise that although an action will lie against one for proceeding *wrongfully* in an *inferior court* in many cases, yet it is a kind of action not to be favoured; and whenever such action is brought, the *express malice* and *grievance must be laid* in the declaration *and proved*; and it is not enough to say that the defendant brought an action against the plaintiff *ex malitia & sine causa per quod* he put the plaintiff to great charges. 1 Salk. 14, 15. 1 Lord Ray. 380, 381. Hob. 266. 1 Rol. Abr. 112. p. 8. I shall consider the declaration in two views: 1st, The plaintiff having laid in his declaration that the *sub-commissioners* condemned the goods, shews a foundation for the defendant's prosecution before them; so that this part of the declaration is plainly *felo de se*. Hob. 266. 6 Mod. 262. Hard. 195. And 2^{dly}, Although it is laid that the *commissioners of appeal* most justly reversed the judgment of condemnation of the *sub-commissioners*, yet we are all of opinion the plaintiff is not intitled to this action, for we cannot infer from the judgment of reversal of the *commissioners of appeal* that the defendant the prosecutor was guilty of any *malice*, and the judgment of the *sub-commissioners* has justified the proceeding before *them*; if an action upon a *false surmise* be brought against me in a *proper court*, I cannot have an action against him that brought it, and charge him with it as a *fault directly*, as if the suit itself was a wrong act, for *executio juris non habet injuriam*. Hob. 266. and the *gist* of these sort of actions arises from some *evil practice* or *malice* in him who sues or prosecutes. Lutw. 1571. Upon the whole we think the plaintiff himself has shewn by his declaration that the prosecution was *not malicious*, because the *sub-commissioners* gave judgment for the defendant, and therefore we cannot infer any malice in him.

Judgment of the *King's Bench in Ireland* affirmed.

Bodwic *versus* Fennell. In Error. B. R.

ACTION of debt for 4*l.* brought upon a *by-law* in the borough court of the *devizes*; the declaration sets out that there has been a custom time out of mind in that borough that no person whatever, unless admitted of one of the *guilds or fraternities there*, has a right to keep a shop in the town, (unless in the time of an open fair) nor to follow any mystery, handicraft or trade in the town, and that a *by-law* has been made for the better preserving and supporting the said custom, which gives a penalty of 4*l.* to *any person who will sue for the same*; and sets forth that the defendant (below) not being admitted of any of the *guilds or fraternities*, and being a stranger to the corporation had kept a shop and exercised the trade of a shoemaker *per quod actio accrevit* to the plaintiff to have and demand the said 4*l.* The defendant below demurred, and

A custom to exclude foreigners in a corporation and a by-law made to support it are good, but the penalty given by the by-law cannot be to a stranger.

O o o

judgment

judgment *there* was given for the plaintiff, and a writ of error is brought and the general errors assigned. This case was argued last *Michaelmas* term.

Mr. *Evans* for the plaintiff in error took several exceptions:

1st, The *custom* is *unreasonable*, because, for any thing that appears, a person who has duly served an apprenticeship in the *Devizes* may not be allowed to follow his trade, for it does not appear upon *what terms* a man is to be admitted of any guild or fraternity; and the *terms* may be very arbitrary, therefore it ought to have been laid in the custom to make it a good one, that every person may be admitted upon *reasonable terms*, as serving an apprenticeship, &c.

2^{dly}, The court where this action is brought is holden before the *mayor, recorder and burgessees of the Devizes*; the action is in nature of a popular action brought by a *stranger*, but yet it must be considered for the benefit of the corporation, so that both the judges and jury, are to judge in their own cause, for the breach assigned is upon the *custom* and not upon the *by-law*, but the *by-law* is only brought in, to fix the damage, which shews the action is principally founded on the *custom*, which is for the benefit of the corporation, who are the judges.

3^{dly}, *There is not a sufficient breach assigned*, for it is not laid that when this shop was kept open that it was not upon a *fair-day*, for any man may keep a shop on a *fair-day*.

4^{thly}, What I principally rely upon is, that supposing the case to be laid properly, and the court below has jurisdiction, yet this plaintiff being a *stranger* cannot recover for the breach of the custom, nor can the corporation, legally, make a *by-law* to annex the remedy to a person who has not the *right*, that is to say, give an action for the penalty to a mere *stranger*.

Mr. *Henley* for the defendant in error: In answer to the exceptions, 1st, It was never doubted but a *corporation* may, by custom, put such *terms* upon the *inhabitants* as are agreeable to, and consistent with the *custom*; and no man can be free of the city of *London* unless he be first admitted of some *Guild*, and if it appears that the *terms of admission or fine* for it be unreasonable, this court upon *mandamus* will judge thereof, therefore the *corporation* cannot put *arbitrary terms* of admission upon any man.

5 Mod. 104. 2^{dly}, The *corporation* is not at all interested in the recovery of the penalty, for the plaintiff *here* recovers for himself.

3dly, The *breach* assigned is, that he kept a shop within the *Devizes*, and exercised the trade of a shoemaker therein *contrary to the custom*, which shews that it was not upon a *fair-day* only, for *that* would not have been *contrary to the custom*.

4thly, A *custom* to exclude *foreigners* is good, and they may make *by-laws* to enforce and support *that custom*, (though I admit a grant from the crown of such a privilege would be bad) and therefore the *by-law* is set out to shew it does not exceed the *custom*.

Lee Ch. Justice: Did you ever know a penalty upon a *by-law* given to a *stranger*?

Dennison Justice: If a *corporation* have a *custom* and any thing be done in breach thereof, the corporation itself must bring the action, and there is no instance of any such action by a *stranger*, but only in that of the *Chamberlain* of the city of *London*, 5 Rep. 63. It has been determined in the case of *Ellington v. Cheney*, 9 Geo. 2. that a *custom* to exclude *foreigners* is good, and that a *by-law* with a reasonable penalty in support of such *custom* is good, when the penalty is given to the *corporation* or *guild*; this was error from the *Mayor's Court of Bath* in an action brought by the *Master* of the *guild* of *Shoemakers of Bath*, wherein the plaintiff declared that it was a *corporation* by prescription, that there had been a *guild* of *shoemakers* immemorially, and that none should exercise the trade who was not made free thereof; and a *by-law* was made, that if any person should follow *that trade* not being free, he should forfeit a certain penalty, to be recovered by the *master* of the *guild*, who brought the action, and the judgment was affirmed.

Then the case at bar stood over, and Mr. *Evans* replied three days afterwards, and cited the case of *Hollings v. Hungerford*, Pasch 3 Geo. 1. which was *debt upon a by-law* for recovery of a penalty upon a *by-law* by the *chamberlain* of *Bristol*; the *by-law* was made under a power they had by their charter, which power was to make *by-laws*, with penalties to be recovered for the use of the *corporation*; the *by-law* in this case was, that every man who should be chosen a *common council man*, if he did not appear within such a time and take the office upon him, should forfeit 200*l.* the defendant did not attend and take the office upon him, so the action for the penalty was brought by the *chamberlain*. The case was argued by Serjeant *Grantbwaite* and Mr. *Yorke* (the present Lord Chancellor) and it was objected by the Serjeant that the *Chamberlain* was a *stranger* to the *corporation*, that he was a *stranger* to the *right*, and therefore was a *stranger* to the *remedy*, for that the *right* was in the *corporation*; but Lord *Parker* Ch. Justice and the court held, that the action was well brought, and that *camerarius ex vi termini* signifies the *treasurer*.

thesaurarius of the corporation; and they declared that he recovered for the benefit of the corporation; and this court will take notice of the relation there is between the *chamberlain* and the corporation, and that he is no *stranger*, but (as it were) part of the corporation; from hence Mr. *Evans* concluded that a stranger cannot bring this kind of action.

Henley: There is no negative determination in the case last cited that they could not have given the penalty to a *stranger*.

Lee Chief Justice: I think none of the *three first objections* will hold, and am only doubtful upon the *last*.

I do not find any instance of an action upon a *by-law* made for the recovery of a penalty in the manner (given to a *stranger*) as this is; for *this* is much the same as if it had been given to be recovered by a *common informer*. In the case of *Hollings v. Hungerford*, the force of the objection was, that the action was brought by a *stranger*; the answer given to it, and upon which the court gave judgment, was, that the *chamberlain of Bristol* was not a *stranger*, but a known officer of the corporation, their servant and appointee to sue for such penalties as the corporation was intitled to recover.

There is a *right* in the corporation in respect to the *custom* itself to have the *custom* adhered to, and they are intitled to damages for breach thereof; when they have made a *by-law* with a penalty for the breach thereof, they have thereby fixed the damages, which they may lawfully do; but I do not know that by any rule of law they can transfer their *right of action* to a *stranger*; I do not mean to bind myself by what I have now said, but this is what I think, as at present advised.

Wright Justice: The only difficulty with me is that the penalty is given to a *stranger*. In the case of *Player v. Archer*, 2 Sid. 105. it appears a *by-law* was made whereby a moiety of the penalty was given to a *stranger*; if they could do *that*, why may they not give away the *whole* to a *stranger*? the *chamberlain of London* is as much a *stranger* to the *right*, as any other person, and where is the unreasonableness of giving the penalty to a *stranger*? in public laws it is very common, and almost always done, this is a point of great consequence, and therefore requires further consideration.

Dennison Justice: I think this *custom* to exclude *foreigners* is good but that the *by-law* is a bad one.

The *corporations* where these *customs* are, have originally a *right of action* in themselves for the breach thereof; this was formerly ^{6 Mod. 21.} a doubt, but has of late years been solemnly determined in *C. B. Mich. 5 Geo. 2.* between the *corporation of Colchester* and *Sympson*, which was an action upon the case against the defendant for exercising a trade not being a freeman, contrary to the *custom*, to the damage of the plaintiff; there is now no doubt but such an action will lie, and a *corporation* need not make any *by-law* to enforce the *custom*, because the law gives them an action originally. They may, indeed, if they please, make a *by-law* and fix a penalty for the breach thereof, but it must be a penalty to the *corporation* itself, and pecuniary, and may be levied by *distress*, or recovered by an *action of debt* at the suit of the *corporation*; I am not for carrying the right to sue, further than the *chamberlain* of a *corporation*, as in *Hollings v. Hungerford*. The case at bar goes further than carrying it to a *stranger*, for it gives the action to *any person whatsoever* let him live where he will, which is extremely inconvenient, for if the plaintiff should be nonsuited where must the defendant find him; and as there is no precedent for such a *by-law* as this is, I am of opinion it is bad, as at present advised.

Foster Justice: These exclusive privileges are much abused; I have no objection to the *custom*, nor to the assignment of the breach thereof, but think the *last objection* requires consideration; in the case of *Hollings v. Hungerford*, the *objection* was founded upon this principle, that the action could not be maintained by a *stranger*; but the answer to it was, that the *chamberlain* was not a *stranger*, but sued for the *corporation's* benefit, and the court seemed to admit the strength of the *objection* that the action could not be maintained in the name of a *stranger*. And in the case of *Ellington v. Cheney*,

9 Geo. 2. the *Ch. Justice* said that an action upon a *by-law* in the name of a *stranger* would not lie; if such a *by-law* as this were to be held good, it would be letting loose all mankind, and a poor man might have 500 actions against him at once, and not know where to find one plaintiff.

This case having stood over for a whole year, the *Ch. Justice* this term gave judgment, and said, that although a *body politic* has power to make a *by-law* to enforce a penalty for breach of a *custom*, yet they cannot give an action (to recover that penalty) to a *stranger*, but the *corporation* themselves, or somebody for them (as the *chamberlain* in the case of the city of *London*) must sue for the same; if the law were otherwise it would be very inconvenient, it would be like assigning a *chose en action*, which the policy of the law will not endure. *Co. Lit. 214. a.* And for this reason the judgment below *per totam curiam* was reversed.

Collet *versus* Masterman administrator. B. R.

Issue, whether
material or
not.

DEBT upon a bond; the defendant pleaded *plene administravit*, the plaintiff replied that the defendant had assets sufficient in his hands to satisfy the *damages* aforesaid, and thereupon issue was joined; and the jury found a verdict for the plaintiff that the defendant had 300*l.* assets in his hands not administered.

Mr. *Whitaker*, moved in arrest of judgment that this is an immaterial *issue*, for it ought to have been whether the defendant had sufficient to satisfy the *debt and damages*.

Mr. *Ford e contra*: The word *damages* is only *surplusage*, and by leaving it out the *issue* will be a sensible material *issue*, *viz.* whether the defendant had *sufficient to satisfy*, &c. and of that opinion was the *whole court*. Judgment for the plaintiff.

Bagshaw *versus* Spencer. In Chancery.

A court of equity will direct a conveyance agreeable to the testator's intention, and depart from the words of a will in case of a trust executory.

Eq. Ca. Abr.
185, 186.

PER Lord *Hardwicke*: A court of equity is sometimes obliged to depart from the words of a *will* in order to direct a conveyance to be made which will answer the *intention* of the testator. The word *issue* in a *will* is a word of *limitation*, but in a deed is always a word of *purchase*. *Heirs of the body* in a *will* are not always words of *limitation*, but may be often taken as words of *purchase*, in order to fulfil the testator's *intention*.

There is a difference between a *trust* which by the words of a *will* is *executed*, and a *trust* which is only *executory*; as a *devise* to A. and his heirs, upon *trust* to convey to B. and the heirs of his body, is a *trust executory*, and this court will make *heirs of the body* words of *purchase*; but a *devise* to A. and his heirs in *trust* for B. and the heirs of his body is a *trust executed*, and B. will have an estate-tail; and this court has greater right to interfere in the one case than the other. As all *trusts* in notion of law were *executory* before the *statute of uses*, which has executed many of them, which are thereby become *legal estates*, and wherewith this court does not interfere, therefore in order to bring a *trust* within the *jurisdiction* of this court it must be *executory*; but where a *trust* is *executed*, the testator has left nothing for a court of equity to do.

Hilary Term

22 Geo. 2. 1748.

Rex *versus* Dr. Purnell Vice-Chancellor of Oxford.

A Rule to shew cause why the *Attorney General*, or *Solicitor*, Upon an information by the *Attorney General* against the Vice-chancellor of Oxford for a misdemeanor in his office, the crown shall not inspect the statutes, and archives of the university. obtained last term, upon the motion of Mr. *Attorney General*, Sir John Strange, and Mr. *Solicitor General*; and now Mr. *Wilbrabam*, Mr. *Henley*, Mr. *Ford*, Mr. *Evans*, and Mr. *Moreton*, shewed cause in behalf of the defendant; and first they objected that the rule obtained was too large and general, whereupon Mr. *Attorney* narrowed it, and acquainted the court that all they wanted was to take a copy of the statutes of the university, which are kept by a proper officer called *Custos Archivorum* of the university, whereby it would appear what was the duty of the *Vice-chancellor*.

Counsel for the defendant: This is an information exhibited by the *Attorney General* *virtute officii* against the defendant for a misdemeanor and misbehaviour in the neglect of his duty, both as *vice-chancellor*, and a *justice of peace* of the university; and what is now prayed on behalf of the crown is contrary to a well known maxim of law, that no man is obliged to accuse himself, and more especially in a criminal prosecution, as *this* is. Doctor *Purnell*, a single member of the university, is prosecuted in a criminal matter; the like might as well be prayed in the case of an indictment of any other member or scholar; or if any one citizen of *London* was prosecuted, the like rule might as well be prayed to inspect the books, papers and archives of the city, which no young gentleman who attends this bar would be so weak as to move.

But suppose the crown, as founder, has a right to visit the university, that is a reason for this court not to interpose, because there could be an other plain method of proceeding.

12 Stra. 1005.

S. P.

No access to
the post-office
books in col-
lateral actions.

Nor to the
custom-house
books.

The case of *Crew v. Blackburn* was a *qui tam* against the defendant as a clerk in the *post-office* for a penalty of 50*l.* for interfering in the election of a member to serve in parliament; a motion was made by the plaintiff for leave to inspect the books of the *post-office*, alledging that these books were touching the public revenue, in which every subject has a right and interest; but the court refused to grant the motion, and confined themselves to *this, viz.* that the question in the cause not concerning any transaction in the *post-office*, (for which transactions only those books are kept,) denied to grant the rule. So, also in the case of *Benson v. Port* in the last term, which was an action on a policy of insurance; the defendant applied for a rule to inspect the books of the *custom-house* (intending to controvert the plaintiff's interest) alledging that those books were of a public nature wherein every subject was interested, as he had paid duties to the crown, and entred merchandizes in those books; but because the question in the cause depending was not touching the subject matter contained in the books, the court refused to grant the rule.

The case cited by Mr. *Attorney* of the *King v. Berking*, 7 Geo. 1. was an indictment for following a trade not having served seven years as an apprentice, which was removed *here* by *certiorari*, and a rule was made to inspect the books and records of the court or corporation where the indictment was found; this is not at all like the case at bar, for it was nothing more than what the party had a right to, as well as every subject in the kingdom has a right to see any public record, as an indictment is.

No inspection
of the books
of the college
of physicians
by a doctor
who is not a
member
thereof.

5 Mod. 395,
396.

Information
against over-
seers for ma-
king an illegal
rate, the
parish-books
shall not be
inspected.

These rules of inspection, in the cases of *copyholds*, *corporations*, books of the *customs*, &c. are never granted but only where civil rights are depending, and by which the very thing in question depends, and must be determined. Doctor *West* was prosecuted for practising physick not being a member of the *college of physicians*, nor having a licence, nor being a graduate of either university; he moved for leave to inspect the books of the *college of physicians*, upon an imagination that he might find some entry therein in his favour; but the court refused to grant the rule, and said the doctor had no right to see the books, he not being a member of the college.

Rex v. Lee, Mich. 17 Geo. 2. was an information against *Lee* another overseer of *Windsor* for taking upon them to make a rate without the concurrence of the *churchwardens*; a rule for the inspecting of the books and papers of the parish was made absolute *sub silentio*, and a rule for an attachment unless cause was made, for disobeying the rule; upon shewing cause against the attachment the court said the rule to inspect the parish-books ought not to have been made, because it was obliging the defendants to produce evi-

dence against themselves, and discharged the rule for an attachment; and the maxim, "*that no man shall be bound to accuse himself*" has always been so religiously adhered to, that in the case of a witness, if any question be put to him which may affect himself he shall not answer thereto, although possibly his answer might do complete justice between the parties, so that the law will rather suffer a particular injustice, than break through this maxim, which would be so generally inconvenient. Many other cases might be cited, as 2 Lord Ray. 927. *The Queen v. Mead*. *Bradshaw v. Hasselwood*. *Same v. Phillips*.

Supposing the defendant has these statutes in his custody, he is only a trustee for the corporation, and whatever crime he may have been guilty of, *that* cannot affect the university; and if the crown is the visitor, the application must be to the Chancellor of *England*, and not to this court; and if this court was to make this rule absolute, it will, (instead of doing justice,) lay a foundation for something like an *inquisition of state*, for this court sits to *bear* evidence, not to *furnish* it.

Mr. Attorney and the counsel for the crown in reply insisted, that the public justice of the nation was concerned, that the crown gave the statutes whereby the vice-chancellor was to govern himself and be governed, that the King had a right to see them, that it might be known and seen whether he had so done.

The court took two days to consider, and then the Ch. Justice delivered the opinion of the whole court.

Lee Ch. Justice: We are all of opinion that we cannot make this rule absolute, and found that opinion upon former cases, but think *this* is a much stronger case than any of them. The only case cited for the King upon the motion for this rule was *Rex v. Berkett* or *Berking*, which was an indictment for exercising a trade not having served an apprenticeship; application was made that the prosecutor might be named, the court could not do *that*, but said "You may have a rule to take a copy of the record, and then you will see upon the backside of the indictment who the prosecutor is"; they had certainly a right to a copy of the record below, and if refused, this court would have granted a rule, but this is not to the present purpose.

The case to the present point is 2 *Ld. Ray*. 927. *The Queen v. Mead*, 2 *Annæ*, where the reason given for refusing the rule was the maxim mentioned at the bar, "*That no man is bound to accuse himself*". Another strong case was in this court, *Trin.* 17 & 18 Geo. 2. *Rex v. Cornelius of Ipswich*. An information was filed against

against him and another justice of peace for exacting money from persons for licensing alehouses; it was moved by the prosecutor for leave to inspect the corporation-books; a rule was made to shew cause in the usual terms to inspect the papers, books and records of the corporation; and upon shewing cause it was very strongly debated on both sides, by Sir *John Strange* and Sir *Richard Lloyd*, and all the cases cited then that have been now cited, before the rest of my brethren (my self absent), time was taken to consider, and I had a conference with my brothers, and we all agreed the rule could not be granted, because it was a criminal proceeding, and that the motion was to make the defendants furnish evidence against themselves; the present case is rather stronger, because it is a prosecution for a *crime of a more public nature*, for unless it be such, this court has no jurisdiction. And this is unlike a *quo warranto*, for that is a right granted by the crown, and the public books and records are the proper evidence on both sides. Rule discharged.

Stork versus Herbert and Eyton. B. R.

Practice.
The title of a
declaration
amended.

A *Latitat* was sued out against the *two* defendants sued jointly, which was returnable the second return of the last term; the defendant *Eyton* only was served with a copy thereof before the return of the writ, and a declaration was delivered to him in an action against *both* the defendants as of *Michaelmas* term last; then an *alias capias* issued, wherein *both* the defendants were named, returnable the first return of the present term, which was duly served upon the other defendant *Herbert*, who filed common bail of this term, and then a declaration was also delivered to him intituled of last term, in the same action against *both* the defendants, and upon the first day of this term a rule to plead against *both* jointly was given, they having *both* filed bail before the rule was given, *viz.* *Eyton* of last term and *Herbert* of this; and now it was moved to set aside the proceedings for an irregularity in delivering a declaration to one defendant in an action against *two*, when *one* was only served with process and in court. But *per curiam*, The irregularity is only a mistake, and the plaintiff may amend his declaration by intitling it of this term: and defendants took nothing by the motion.

Goldsworth

Goldsworthy *versus* Southcott. B. R.

THE defendant died after interlocutory judgment signed, and after a writ of inquiry executed and damages assessed, but before the return thereof, or final judgment was entred, and thereupon the plaintiff sued out a *scire facias* against the executor of the defendant, to shew cause why a new writ of inquiry of damages should not be awarded and new damages assessed and be recovered; and now Mr. *Hussey* moved to quash the *scire facias*, because it did not state the situation of the cause at the instant of the defendant's death; for damages were at that time assessed, and the *scire facias* ought to have been to shew cause why the damages assessed by the jury should not be adjudged to the plaintiff, &c. and of that opinion was the court, and quashed the *scire facias*; *Dennison* Justice cited *Spencer Compton v. Leeds*, 13 Geo. 1. C. B. where the form of this kind of *scire facias* was settled on a demurrer, viz. that it must be to shew cause why the damages assessed by the jury should not be recovered, and said he heard the argument in that case.

Where a defendant dies after a writ of inquiry executed and before the return thereof, the *sci. fa.* against his executor must be to shew cause why the damages assessed should not be recovered.
1 Salk. 115.
Lill. Entr. 647.

Parsons *versus* Lanoe. In Chancery, 28 January.

COLONEL *Lanoe*, an officer in the army, being about to go to *Ireland*, in July 1732. made his will, wherein he expresses himself thus, viz. "I make my will in manner following; First, In case I die before I return from my present journey to *Ireland*, I order that my house at *Farley-hill* and all the furniture be sold as soon after my decease as conveniently may be, then charges the same with his debts and funerals, and gives 1000*l.* to be paid out of the money arising by such sale to *Theophilus B.* and other legacies, and after payment of his debts and legacies, gives the residue to his wife and her heirs for ever, and makes her and *Ingram* and the plaintiff *Parsons* executors."

Testator devises that if he dies before he returns from *Ireland*, his estate shall be sold, &c. he does return, and dies, and this will is found in his keeping at his death, it was only a contingent devise, and shall not take effect.

Soon after the making of his will the testator went to *Ireland*, continued there for some time, and then returned to *England*; at the time of making his will and going to *Ireland* he had no children, after he returned he had two by his wife, a son and a daughter, and lived till 1738. when he died.

It appears in the cause that the testator kept the will by him, that he made no other will, and that it was found in his keeping at his death, and has been proved in the spiritual court; and now this bill is brought for the 1000*l.* to have the real estate sold, and to have performance of a contract entred into for the sale thereof to Mr.

Mr. *Walker*; the widow and executors, Mr. *Walker*, and the son and heir of the testator, are made parties.

Swinburne.
Condition.

Lord Chancellor: Two questions have been made, 1st, Whether this be not a contingent disposition; 2^d, Whether the testator's returning from *Ireland*, living afterwards with his wife till 1738. and having two children without ever republishing his will shall not amount to a revocation thereof, notwithstanding the evidence of his keeping it by him; and as to the first point, I am of opinion that this is a contingent disposition, and depended upon his not returning from *Ireland*; and therefore I shall give no opinion whether the great alteration in the testator's family amounts to a revocation; there is a great difference since the statute of frauds, between what would amount to a revocation of a will of lands, and of a personal estate; for as to lands, *that* statute prevents *all other ways* of revoking a will except *those* therein mentioned. Dismissed the bill without costs.

Rex *versus* Brough, Esq; Mayor of Hedon. B. R.

Information in nature of a quo warranto; defendant pleads he is a Gentleman and not an Esquire, this is bad, because this kind of proceeding is not within the statute of additions.

INFORMATION in nature of a *quo warranto* against the defendant to shew by what authority he exercised the office of mayor of the town of *Hedon* in the county of *York*; the defendant pleads that at the time of exhibiting the information he was a gentleman and not an *Esquire*, *absq' hoc* that he was an *Esquire*. In last *Trinity* term Sir *Thomas Bootle* moved to set this plea aside as frivolous, and only pleaded to gain time, and to prevent the information from being tried at the next assizes, for that the defendant by his office of mayor appeared to be an *Esquire*; besides, informations in nature of *quo warranto's* are not within the *statute of Hen. 5. of Additions*; the court were strongly inclined to set the plea aside upon motion, and said they had no doubt but it was bad, but as it was a new case they could not set it aside upon motion, but that after it has been once determined to be bad upon a demurrer, they would from thenceforth set it aside upon motion; therefore a demurrer was afterwards put in to this plea, which came on to be argued this term.

Serjeant *Bootle pro Rege*: The plea is bad, because the statute of additions only extends to actions personal, appeals, and indictments wherein process to the outlawry lies, and not to informations in nature of *quo warranto's*, wherein there is no original writ, nor will process to the outlawry lie.

But suppose this case be within the statute of additions yet the plea is bad, for the addition of *Esquire* is as well as gentleman; the King's

King's serjeant of the kitchen is an *Esquire*, and yet he may be sued by the addition of *Cooke, Esquire* or *Gentleman*, and all degrees below *Knight*, are names of *worship* only. *Theol. Dig.* 57. p. 6. The plea is also bad in point of form, for it ought to conclude *et hoc paratus est verificare*, and not with a *traverse*. *Rast.* 108.

Mr. Nares *è contra*: It having never been determined whether these kind of informations are *civil* or *criminal* suits, I am at liberty to say they may be considered as *criminal*, and if so, process to the outlawry lies. *Salk.* 371. which brings *this* within the statute of additions. I admit a man may be an *Esquire* by his office, but no part of our plea admits the defendant to be *mayor*; there is certainly a difference between an *Esquire* and a *Gentleman*, inasmuch that the court of C. B. Hil. 14 Geo. 2. between *Messor v. Molyneux*, in a motion for a *procedendo*, an affidavit was produced, wherein a person named therein *gentleman* appearing to be a *barrister*, the court would not permit the affidavit to be read, because a *Barrister is an Esquire* by his office or profession.

As to the objection to the *traverse*, that is only surplusage, and there are many cases where a *denial* and *traverse* are the same thing, *Lambert v. Strowther*, Hil. 14 Geo. 2. C. B. the defendant pleaded *liberum tenementum*; the plaintiff replied it was *his freehold and not the freehold of the defendant*, and this was held good without a *traverse*.

Lee Ch. Justice: There never was any process to the outlawry upon an information in nature of a *quo warranto*, which is not like a *quo warranto* by original writ, which was in use before this manner of proceeding; the *stat. of Additions* is to be taken strictly, 2 *Inst.* 670. and only extends to cases where process of outlawry lies. *Cro. Eliz.* 148. Lord *Dacres's* case; I shall say nothing as to the manner of pleading, because I am of opinion this case is not within the statute of additions. Judgment by the whole court, that the defendant *respondeat ouster*.

Wightman *versus* Thompson.

MOTION to change the *venue* upon the common affidavit, after an order of a judge for time to plead upon pleading if-
quably and taking short notice of trial for the sitting within term in
Middlesex, the court changed the *venue*.

Venue
changed after
judge's order
to take notice
of trial in
Middlesex.

Easter Term

22 Geo. 2. 1749.

Tomlin spinster by her guardian *versus* Brookes.

Infant by
guardian sues,
the plaintiff's
attorney must
give notice of
the guardian's
place of
abode.

ACTION upon the case upon a promise of marriage, Mr. *Weller* moved on the behalf of the defendant that the plaintiff's attorney might be obliged to give notice to the defendant's attorney of the place of the guardian's abode, upon an affidavit that the defendant did not know where the guardian lived, but had heard he was a man of mean circumstances. *Per curiam*, This was granted, and is often done in the cases of *qui tam* and infants.

Trinity Term

22 & 23 Geo. 2. 1749.

Dore *versus* Geary. In Chancery, June 12.

A Feme covert being intitled to 100*l.* *bank-stock* as administratrix to her late mother *Mary Dowse*, and to 600*l.* *bank-stock* as executrix to her late uncle *William Fletcher*; her husband in *February* 4, 1743. made his will, and thereby devised to his wife all that 700*l.* *India stock*, which he was intitled to, interested in, or possessed of, to dispose of as she should think fit; at the time of making his will, the husband had no stock at all in any of the funds, but soon afterwards his wife transferred to him the 700*l.* *Bank stock* which she was intitled to as aforesaid, and the same stood in his name at the time of his death, which happened soon afterward; the husband also before his marriage gave a bond in 1731. that he would leave her 500*l.* The wife soon after died, having made her will, and appointed plaintiff her residuary legatee, under which claim the plaintiff has brought his bill for the 700*l.* *Bank stock*.

Feme covert as executor to A. and administrator to B. is intitled to 700*l.* *Bank stock*, her husband devises to her 700*l.* *India stock* which he is interested in, or intitled to, and after making his will she transfers it to him, the *Bank stock* shall pass.

It appears in proof that the husband had no *India stock*, nor any stock at all at the time of making his will, that the wife's mother or uncle owed no debts.

Per Lord Chancellor: The husband before the stock was transferred to him had an interest therein, and though he had not such an interest as he could have transferred without his wife, yet *that* will make no difference, for the mother and uncle owed no debts. 2dly, The description of the thing is only a mere mistake, for it is plain the husband meant the *Bank stock*, because it agrees with the sum; and there are many cases of the like kind, where the names of the devisees, and descriptions of the things devised have been mistaken, and yet (when the testator's meaning and intention is plain), have been held good; as where a man gives his *black horse* and has only a *white horse*, the *white horse* shall pass; so also where a legatee's christian and surname are both mistaken, as in

Beaumont

Beaumont v. Fell, 2 P. Wms. 141. So in Ro. Abr. 614. p. 4. A man devised lands in such a place, he had no lands, but only tithes there, which passed. Suppose the husband had assigned his interest in the stock before his wife transferred it to him, it would have been good, like the case where the husband disposes of his wife's term for years; besides, I am of opinion that the husband was bound to provide for his wife, which strengthens this case. Decreed for the plaintiffs.

Chitty's Case. B. R.

The King's debtor committed by the Exchequer to the Fleet brought into B. R. by ha. cor. and surrendered in discharge of his bail, may be removed again to the Fleet by an ha. cor. from the Exchequer.

CHITTY was committed to the *Fleet* by the court of Exchequer for a contempt in not paying the sum of 1700*l.* a debt due to the crown, and was now brought into this court by his bail by virtue of a *habeas corpus*, and by them surrendered to the marshal in discharge of themselves in a cause depending *here*, whereupon Mr. Attorney General moved for a rule to remand him to the *Fleet*; but *per curiam*, You must bring an *habeas corpus* from the Exchequer, and the marshal shall now return it to *that* court, who may then recommit *Chitty* to the *Fleet*; and this has been often done both in civil causes between subjects, and in criminal causes at the suit of the crown.

The Duke of Bedford *versus* Alcock. B. R.

Joint counts in an action. Debt upon an amercement in the leet, founded upon a presentment by five ale-conners, and upon a mutatus may be joined in the same action.

ACTION of debt for an amercement in a court leet; the declaration sets forth, that the *Duke* is seised of the manor of *St. Giles in the fields Bloomsbury*, and that there is a custom within the manor for six ale-conners to be appointed by the *steward*; that they, or the major part of them, ought to view, search into, and weigh all the loaves of bread within the manor not exceeding three-penny loaves, or half quartern loaves, to see whether the same be of due weight; that they are to present every such baker whose bread is found wanting in its due weight, and that if any baker hinders those ale-conners from searching and weighing his bread, after request and refusal they may present such baker at the next court leet; that the defendant *Alcock* on the 15th of April 1746. was an inhabitant and baker within the manor, and that at a court leet held the 15th of April 1746. six ale-conners were appointed and sworn in order to search and present as aforesaid; that five of these ale-conners on the 17th of June 1746. perambulated the manor, and went to the house of the defendant to weigh his bread, and that the defendant refused to permit them to weigh it; that therefore at the next court leet they presented the defendant to the court, who amerced him, which amercement was then affeered by three affeers to thirty-nine shillings, to be paid to the plaintiff the lord of the manor, whereby an action accrued.

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The second count in the declaration sets out another custom, that at every *Easter court leet* in this manor a jury is appointed to search and weigh the bread of all bakers in the manor that are above the price of three penny loaves, that the jury perambulated the manor in order to search and weigh bread, &c. that the baker the defendant refused to permit this jury which consisted of 31 persons, to weigh his large bread, or to view it, therefore they presented the defendant to the leet, which *amerced* him, which *amercement* was *affeered* to 39s. by which an action accrued to the plaintiff; the third and last count, is upon a *mutuatus* for 22 shillings, making up the whole demand in the declaration, which is of a plea of debt that the defendant may render to the plaintiff 5*l.* which he owes to, and unjustly detains from him, &c.

There is a general demurrer to the declaration, and a joinder in demurrer. This case was argued by Serjeant *Wynne* for the defendant, and Serjeant *Boote* for the plaintiff, in *Trinity* term last.

Serjeant *Wynne* for the defendant: The custom for *six* persons to present is bad, because it could never have any legal commencement, being against a well known principle of the common law, which requires that all offences shall be presented by a jury of *twelve* men at the least. 1 *Ro. Abr.* 564. *pl.* 17. *Cro. Car.* 259. *S. C.* *Cro. Eliz.* 654. 1 *Sid.* 233.

The custom is also bad in another respect; it is laid, that if any baker refuses to let these *ale-conners* weigh and search his bread they are to present him; I say this is bad, because the *court leet* has no such power *out of court*, so cannot delegate these *ale-conners*, they may *fine* and *imprison* for offences in court, but have no consuance of matters *out of court*.

It is also laid, that if any bread be found wanting in the *assize* they may *present*, &c. It is certain the *assize* of bread varies very often, and it ought to have been specified what was the *assize* of bread at this time; in 2 *Salkeld* 687. *Rex v. Flint*, an indictment for selling bread too light was held bad by *Holt & Cur'*, because it was not laid what was the due weight, or how much was wanting; besides, the offence of making bread too light is a new offence, made so by statute, and therefore there could be no such custom as is laid.

It does not appear by the declaration *where* the *court leet* was held, nor is it said in *what sum* the defendant was *amerced*, but only that he was *amerced*, and that *amercement* was *affeered*, it ought to have shewn how much the *amercement* was. * *Hob.* 129.

* *Salk.* 56.
contra.

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Quære the
case Winter
v. Norris,
Hil. and East.
8 Geo. 2.
debt for an
amerement
in Stepney
court cured
after a verdict.

It may be questioned whether the lord be intitled to the *amerements*, for the crown may grant a *leet* and reserve the *amerements*, and if the lord be intitled it may be a question whether an action will lie; I admit he may distrain, and that an action will lie for an *amerement* in a *court baron*, but I do not know that it will in a *court leet*.

The *mutuatus* cannot be joined with the two first counts, because it is matter *in pais*, and the other counts depend upon the records of the *court leet*; and it appears the *leet* adjourned, which it could not do.

Serjeant *Bootle* for the plaintiff: The *court leet* has original jurisdiction as to the *assize* of bread, and if there was not some way to force *bakers* to permit the proper officers appointed by the court to view their bread, the jurisdiction would be nugatory, *Kitch.* 12. p. 26. *ale-conner* is an officer of the *leet*, and by his oath in *Kitch.* 46. b. he is to see that bread sold from time to time be of due weight. And by the *stat.* 8 *Annæ* c. 18. the rights of lords of *leets* are saved as to *assize* of bread.

It is objected that it is not averred *what* the *assize* of bread was at the time of the presentment; to this it is answered, it is not necessary, for the custom is to see it be of due weight.

It is also objected that it is not said *where* the court leet was held; to this I answer that it is alledged to be holden within the manor, and there is no occasion to say at what *house*, or *sign*.

It is further objected to the *amerement*, that it is not said *what sum*; to this 1 *Salk.* 56. is an answer. And in *Mich.* 3 *Geo.* 2. *B. R.* *Stevens v. Howard*, in debt for an *amerement* in the court of the *Dean and Chapter of Westminster* this objection was taken, that it was not said how much the *amerement* was, only that the party was *amerced*, which was *affeered* to so much, and the objection was over-ruled.

I admit there may be a grant of a *leet*, and the *finés* and *amerements* reserved to the crown, but the court will not presume this; it must be shewn on the other side; the lord is *prima facie* intitled to the *amerement* and to this action, and the books are full of precedents to this purpose.

In the case of *Wicker and Norris*, there was a custom that the jury might adjourn in the *leet*; and Lord *Hardwicke* thought the custom good.

It is objected the *mutuatus* cannot be joined, if so, this court will have no jurisdiction for *amercements* under 40 shillings.

Lee Ch. Justice: *Hob.* 129. (cited) has been often denied to be law.

This case was argued the second time by Mr. *Jodrell* for the defendant, and Mr. *Ford* for the Duke, in *Hilary* term last.

Mr. *Jodrell* for the defendant: The *court leet* is derived out of the *torn*, and is a kind of *inferior torn* granted to lords of manors, who, otherwise were formerly obliged to appear at the *sheriff's torn*, and as the jury in the *torn* were of the very essence of that court; so they must likewise be in the *leet* which is derived out of the *torn*, 2 *Inst.* 71, 72. and therefore it is contrary to law for *six* jurors to present offences in the *leet*.

The *statute of Westm.* 2. c. 13. was made to prevent sheriffs in their *torns* from fining without a jury of *twelve* men at least, and it extends to presentments in the *leet*, as Lord Coke in 2 *Inst.* 338. expressly says, and that this *statute of Westm.* is only declaratory of what was (before) the common law, for there is no saving of any customs in the statute; if this custom to present by *six* jurors was in this *court leet* before the statute, it is now abolished by the statute, if this *leet* was taken out of the *torn* since the statute this custom is bad, being contrary to it. The *steward and jury* constitute the *leet*, for without these it cannot exist; the *jury* is to present, and the *court* to punish, and a custom to take away the office of a judge and jury of 12 men is against law.

The offence for which the defendant is amerced is not within the jurisdiction of the *leet*, for if it was, what occasion was there for the *stat. 8 Ann.* c. 18. which gives power to justices of the peace to enter *bakers* shops and weigh their bread; like the statute which gives the like power to inspect *apothecaries* shops; and this power given by statute, is what never could exist at common law, for no man could enter another man's house; and if the defendant be obliged to permit his bread to be weighed in his house, it would be for him to find evidence against himself. I admit they have power to perambulate the *leet*, and may buy the defendant's bread, and if the same be under due weight may convict him in the *leet* by a proper jury; but this custom to enter a man's house, in the manner it is laid, is very inconvenient, and inconsistent with the liberty of the subject.

Ford for the plaintiff: *Courts leet* have been time out of mind, and it appears by our most ancient statutes that they have had jurisdiction

dition of almost all offences against the public. *Stat. 51 H. 3. de pane & cervisia.*

I admit that a presentment by *six jurors* in the *torn* would be bad, but it does not from thence follow that it would be so in the *leet*, for the words in *Westm. 2. c. 13. et sic observetur de quolibet balivo libertatis* does not include the steward of the *leet*. *Co. 2 Inst. 388.*

³ Leon 7, 8. The only true standard and criterion of a court *leet* is the custom and usage of the place, *Keilw. 140. 1 Ro. Abr. p. 11, 12. Hard. 56. Lane 55, 56. Cart. 177.* and where the custom only extends to affect the *person* by a jury of *six persons*, that may be good, but if the freehold be concerned there must be a jury of *twelve*. The presentment by *six jurors* is not conclusive, the party who thinks himself aggrieved may have a *replevin*. *Cro. Jac. 583.* That an action of *debt* lies for an *amercement* in the *leet*. *Rast. 151. Old Book of Entries 63. b. Cro. Jac. 582. 1 Brown Ent. 154, 168, 169, 170, 171.* That debt for an *amercement* and a *mutuatus* may be joined. *2 Brown. Ent. 83, 84.*

Bro. Presentment 1.
Cro. Eliz. 885.
2 Ro. Rep 40.
Salk. 107.
Carth. Mattheus v. Cary,
1 Bulf. 13.

Judgment of the court. This term *Lee* Chief Justice gave judgment of the court for the plaintiff.

Lee Chief Justice: There are three counts in the declaration to which there is a general demurrer, so that if any one of the counts in the declaration be good, judgment must be for the plaintiff, if such count can be properly joined with the other two; and we are all of opinion that the count upon a *mutuatus* is good, and may be joined with *debt for an amercement in a court leet*, and that they are not actions of different kinds; the whole three counts are for a *debt* created by different means, but all upon contracts, the *first* upon implied *contracts in law*, and the *mutuatus* upon an *express contract*; and the true way to judge of this matter is *this*, that whenever the same *process* and *judgment* are in two counts they may be joined, otherwise they cannot; the *process* and *judgments* in all the three counts are the same, and they are very similar, for as *debt on an amercement* cannot be maintained against an executor, so neither can *debt upon a mutuatus* be maintained against an executor, because *wager of law* lies in both, *Slade's case 4 Rep. 93. 1 Vent. 366.* *debt on a judgment* and a *mutuatus* may be joined; so may *debt on a bond* and a *mutuatus* although there be different pleas required, because there is the *same process* and *judgment*. *Debt and detinue* may be joined. *Bro. Joinder in Action, pl. 97.* In *2 Salk. 772.* is a precedent of a record, which was error from the C. B. argued by Serjeant *Cbesbyre* and Serjeant *Pengelly*, in an action of *debt on an amercement* in a court *leet*, and a *mutuatus* joined, but it was not objected that they might not be well joined; and there-

If one count in a declaration be good, though all the rest be bad, there shall be judgment for the plaintiff upon a general demurrer to the whole.
Vide part 2.
321. S. P.

Plowd. 182. b.

fore as the *mutuatus* in this case is a good count, and may be joined, we must give judgment for the plaintiff, for *non constat*, but that upon a trial the plaintiff might be able to prove *that* count, and might take a verdict upon the same, though the other counts should be bad, and therefore we have no occasion to give any opinion as to the other two counts.

Michaelmas Term

23 Geo. 2. 1749.

Kenchin *versus* Knight. B. R.

TRESPASS *quare clausum fregit*; the defendant pleads a custom that all the tenants and occupiers of certain ancient messuages have a right of common in the place where, &c. as belonging to the said ancient messuages, for all their cattle *levant and couchant* on those messuages, and under such custom justifies the putting in his swine, &c. The plaintiff replies and confesses the custom as pleaded to be true as far as it goes, but adds, that the custom goes farther, that is, that they must be rung to prevent their rooting up the soil; the defendant demurs generally to this replication. This case was argued twice at the bar; it was objected for the defendant that the replication was bad for want of traversing the custom in the plea.

If a custom be pleaded, another custom repugnant to it cannot be replied without a traverse, but a custom or matter consistent with it may, without a traverse.

Per curiam: When a particular custom is pleaded, another custom repugnant to it cannot be replied without traversing the custom insisted upon in the plea, for if it were otherwise, pleadings would run to an infinite prolixity; but this is not the present case, for the plaintiff, in his replication, admits the custom in the plea so far as it goes, and then says there is another thing to be done, which is quite consistent with the custom, and that is, to ring the swine, which is rather a qualification of the custom pleaded, than a different one; and this replication brings the matter to a single point, which is the end of special pleading; and we all think the replication is very good, but have some doubt whether the plea be good, for it

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seems to be new to plead this as a custom, for right of common has not been pleaded by way of custom only in the case of copyholders, which is of necessity; but we give no opinion as to the plea, the replication being good, there must be judgment for the plaintiff.

Taylor *versus* Joddrell. B. R.

The defendant permitted to plead a special justification after he had pleaded the general issue, upon terms.

IMPRISONMENT: defendant pleaded the general issue inadvertently, and now moved to withdraw it, and for leave to plead a justification that he was master of a ship, that the plaintiff was making a mutiny therein, and so he imprisoned him; this was done in *Blackburn v. Matthews* upon terms of taking short notice of trial. And in *Tarlton v. Wragg*, Trin. 20 Geo. 2. defendant pleaded the general issue, and wanting afterwards to pay money into court, the defendant had leave to withdraw his plea, pay money into court, and plead the general issue again. In Trin. 21 Geo. 2. *Water v. Bowell*, the defendant in Hilary term before, having pleaded two pleas had leave in Trin. term following to plead a third plea; and in Mic. 21 Geo. 2. *Jefferys v. Walter ante 177.* leave was given to withdraw *non est factum*, and to plead the statute of gaming.

Per curiam: There are many instances of this having been done when the court can prevent the plaintiff from suffering any inconvenience by it, as by obliging the defendant to take short notice of trial, and that if there be a verdict for the plaintiff he shall have judgment as of the present term; therefore let the defendant be at liberty to plead a justification, and the general issue also, if he pleases, upon the terms mentioned.

Rex *versus* Fitzgerald. B. R.

A person committed by a secretary of state, having been imprisoned two years without prosecution, discharged.

THE defendant was brought up by a messenger to the secretary of state upon a *ba. cor.* whereupon it was returned that the defendant was taken up by a warrant from the secretary of state, and committed to his custody two years ago, on suspicion of *high treason*; and now it was moved by Mr. Henley that the prisoner might be discharged absolutely; Mr. Attorney General for the crown opposed his being absolutely discharged, and insisted he ought to give bail, although at the same time he admitted he had no particular act of *high treason*, or any evidence thereof to charge the defendant with, or lay before the court. Mr. Henley *totis viribus* opposed his being obliged to give bail, and insisted he had a right to his liberty, this being an illegal commitment; *1st*, Because there is no charge of any fact, or any ground of suspicion, nor does the warrant mention

tion either; 2dly, The commitment is illegal, because the warrant is only to bring him to be examined, not to commit him, and he cannot be committed to a messenger, for messengers never make any returns to justices of *oyer and terminer*, and the defendant has been a prisoner ever since *February 1747*. *Per curiam*, Here is nothing but suspicion, no fact alledged against the defendant, and unless Mr. *Attorney* will undertake to prosecute directly, and have the defendant tried, he must be discharged without bail; upon which it was adjourned till next day, when the defendant was brought up again; and Mr. *Attorney* then declaring that he had no instructions to prosecute, the defendant was discharged absolutely.

Bull *versus* Steward. B. R.

ACTION upon the case against the defendant, bailiff of the *Borough court of Southwark*, for an *escape upon mesn process*; the declaration sets out the levying the plaint and proceedings in the *Borough court* until the arrest, and that the defendant *Alice Rawlins* in that action being in the now defendant's custody, he suffered her to escape to the plaintiff's damage; upon the general issue there was a verdict for the plaintiff at last *Surry* assizes. And now it was moved in arrest of judgment that the present declaration was ill; 1st, Because it appears that the plaint in the court below was levied against two persons *John Warner* and *Alice Rawlins*, but only one was proceeded against, so that the plaintiff by process against one only could not have had the effect of his suit below; to this it was answered and resolved *per curiam*, That even supposing the plaint to be erroneous, yet the officer shall not take advantage thereof in a collateral action as this is, and he may justify the arrest under the process, and he shall not be suffered to say in this action that the plaintiff could not have had the effect of his suit below. 2dly, It was objected that the declaration doth not alledge in what manner *Alice Rawlins* was indebted to the plaintiff, but only in general that she was indebted; it might be upon a judgment, or such a debt as *that* court has no jurisdiction of, nor does it appear that the cause of action arose within the jurisdiction; to this it was answered and resolved *per curiam*, That this being after a verdict we will suppose every thing proved at the trial which was necessary to be proved, and that the cause of action arose within the jurisdiction, unless the contrary could be made to appear upon the face of this record. Judgment for the plaintiff.

Escape upon mesne process issued out of the borough court against the bailiff thereof, defendant here shall not take advantage of any error in the process below under which he may justify.

After a verdict the court will suppose every thing to be right unless the contrary appears on the record.

Anonymous.

Anonymous. B. R.

Amendment.
Declaration in
a qui tam ac-
tion amended.

THIS was an action *qui tam* upon the statute to prevent fraud in the admeasurement of coals: Sir J. Strange moved for leave to amend the declaration, and cited 3 Lev. 347. *The Dukes of Marlborough v. Widmore*, 2 Stra. 890. and *Wynne qui tam v. Middleton*, which was an action for a false return of a member of parliament wherein the court gave leave to amend the declaration, and upon shewing cause the rule for the amendment was made absolute; *per curiam*.

Hilary Term

23 Geo. 2. 1749.

Saunders *versus* Fortescue. B. R.

Homine replegiando brought for plaintiff's wife, who dies after appearance and before a plea, Quære, whether the suit shall stay?
Skin. 337.
4 Mod. 183.
Carth. S. C.
Salk. 581,
705.

AN *homine replegiando* being brought against the defendant for the wife of the plaintiff, an *alias* and *pluries* issued thereupon, to the last of which writs the defendant appeared; notwithstanding *that*, a *capias in Withernam* was issued against defendant, which was held to be irregular, and therefore all process thereon was stayed.

The wife of the plaintiff being dead since the defendant's appearance, it was now moved that all proceedings in this action be stayed; *1st*, Because the party detained is a necessary party to this suit; *2dly*, From the form of the condition of the recognizance of bail in this action, which is that the party defendant shall appear *de die in diem* plead *non cepit*, &c. and if judgment shall pass against him, he shall render the body of the plaintiff's wife, or his own body in *Withernam*, and shall also pay the damages and costs recovered by reason of the taking and detaining, &c. Now the plaintiff's wife being dead it is impossible to deliver up the person of the woman, or to comply with the condition of the recognizance; and plaintiff may have an action for the detainer *per quod consortium amisit*.

Cro. Jac. 538.
Cro. Car. 89,
90.
1 Sid. 346.

To this it was answered for the plaintiff that this action is brought for two purposes; 1st, To remove the custody of the person taken and detained; 2^{dly}, For damages; and although the first cannot be had in this case because of the death of the party detained, yet if the taking and detaining of the plaintiff's wife has been unlawful he shall recover damages, and if cattle die pending a replevin, yet the suit shall go on.

Per curiam, It is too much for us to stay this suit upon a motion, and therefore let the plaintiff declare, and the defendant may by pleading take what legal advantage he can.

Hanson *versus* Parker. B. R.

THIS is an action of *debt* upon a bond, with condition for the payment of a certain sum of money to one *Lydia Dovey*; the defendant craves *oyer* of the condition, and pleads payment *post diem* to *Lydia Dovey*. At the trial it was given in evidence that *Lydia Dovey* in conversation touching this bond, being asked if the defendant owed her any money, declared he did not owe her any thing, whereupon the jury gave a verdict for the defendant. And now it was moved for a new trial, that the declaration of *Lydia Dovey*, who was not the party plaintiff in this action, ought not to affect the plaintiff, and *Lydia Dovey* made an *affidavit* that the money had not been paid to her, and that she looked upon the defendant to be indebted to the plaintiff who was the obligee in the bond.

Debt upon bond - with condition for payment of money to a third person *Lydia Dovey*, who declares defendant owes her nothing, and a verdict for defendant, such declaration was proper evidence; for *Lydia Dovey* is to be considered as the real plaintiff.

But *per curiam*, A new trial was refused, for *Lydia Dovey* is to be considered as if she were really plaintiff, and the action (as appears to us) is brought for her benefit; and if the condition of the bond being taken for payment of money to her) was capable of any explanation, it ought to have been explained to the jury at the trial, and we cannot admit of *affidavits* to explain evidence given at trial, so the plaintiff took nothing by the motion.

Skelton *versus* Hawling Executor, &c. B. R.

If an executor or administrator confesses judgment, or suffers it to go against him by default, he thereby admits assets in his hands, and is estopped to say the contrary, in an action on such judgment suggesting a devastavit.

SKELTON brought *debt* upon a bond against *Eliz. Maddox* an administratrix who suffered judgment to go against her by default; she makes her will, and the defendant *Hawling* executor thereof, and dies; and this action upon the judgment is brought against *Hawling*, suggesting a *devastavit*. *Hawling* pleads that he has fully administered the goods and effects of *Eliz. Maddox*; and to prove a *devastavit* the judgment by default was given in evidence at the trial; and whether a judgment by default against the defendant's testatrix, who was an administratrix, is an evidence of a *devastavit*, was reserved for the opinion of the court.

For the plaintiff it was insisted, that if an executor or administrator confesses judgment or suffers the same to go against him by default, he admits assets in his hands and is estopped to say the contrary upon a *devastavit* returned, and so is a jury. 1 *Salk.* 310. *Comyn* 87. S. C. And in 6 *Mod.* 308. if an executor suffer judgment to go against him by default, upon executing a writ of inquiry he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir, for he should have pleaded *plene administravit*, or specially, *what assets he has*. So if judgment be given against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a *devastavit*, as if it had been found against the executor by verdict, for *per curiam*. He hath charged himself by his own plea, *Cro. Eliz.* 102. *Wharton v. Richardson*, widow, administratrix in this court, *Trinity term* 10 Geo. 2. there were two *scire facias*'s against the defendant as administratrix of her late husband to shew cause why *Wharton* should not have execution of a judgment recovered against her husband; both which writs were returned *nichils*, whereupon a *scire facias* inquiry issued; the defendant attended the execution thereof, and offered to lay an account of the assets of her late husband before the sheriff and the jury, but the plaintiff insisting that the award of execution upon the said *two nichils* was legal evidence of assets, the jury found a *devastavit*; afterwards she appeared to the *scire facias* inquiry, pleaded *plene administravit*, and traversed the inquisition which found a *devastavit*, but not expecting to succeed in the trial of this issue, she moved the court to have the award of execution set aside upon the *scire facias*'s, and to be permitted to plead thereto upon proof to the court that the assets in truth amounted to a very small sum (in comparison to the debt in demand), which she offered to deliver up; and to be examined upon interrogatories; and though the court thought this a very hard case, she having had no notice of the *scire facias*'s, yet they refused to let her in, to plead to the

scire facias's, or to relieve her, she having acquiesced too long; from this case it appears plainly that the counsel for the defendant *Richardson* and the court took it to be certain that the award of execution after two *nichils* was evidence of a confession of assets.

There was a case of *Challoner v. Challoner* before Lord *Hardwicke* at the sittings in *Middlesex* after *Hilary* term 1736. The plaintiff having recovered a judgment by default against the defendant as administratrix, in debt upon a bond given by the intestate, brought an action upon that judgment against the same administratrix, suggesting a *devastavit*; upon *nil detinet*, the plaintiff at the trial gave in evidence a copy of the judgment by default, which was held to be sufficient evidence by Lord *Hardwicke*, who sent for *Salkeld's reports* into court, and held 1 *Salk.* 310. for good law.

On the other side it was argued for the defendant *Hawling*, that although the judgment by default against *Maddox* might be considered as an admission of assets by her in case an action had been brought against her upon that judgment, yet in the present action against her executor it shall not be so; and there is no case in the books in point for the plaintiff.

In *Bird v. Culmer*, *Hob.* 178. and 1 *Ro. Abr.* 929. B. p. 3. the defendant pleaded *plene administravit*, and afterwards *relicta verificatione cognovit actionem*; and *Richardson* prayed judgment *de bonis propriis*, but the court said that the judgment only confessed the action, not assets, and the plaintiff had judgment only *de bonis testatoris*.

If a judgment by default be evidence of a *devastavit*, why does not the plaintiff immediately thereupon take out execution *de bonis propriis*, and yet this never was done.

As to 6 *Mod.* 308. that is a resolution upon no case stated; and the case on a demurrer in *Cro. Eliz.* 102. differs very much from the case at bar, and so does *Wharton v. Richardson*.

If every judgment against an administrator or executor by default be evidence of assets, they must be obliged to controvert every action which shall be brought against them, which would be of great inconvenience, for whoever pleads *plene administravit* does so at the peril of costs.

Before the *stat.* 4 & 5 *W. & M. c.* 24. s. 12. there was no action against an executor of an administrator.

The

The court after having taken time to consider gave judgment, That if an executor or administrator suffers judgment to go by default or confession, and an action be brought against him on that judgment, suggesting a *devastavit*, he cannot plead *plene administravit*, for by the confession of the judgment, or letting it go by default, he has admitted assets to the amount of the demand; and it is the same, if the action on the judgment be against the executor or administrator of an executor or administrator. Judgment for the plaintiff.

Ryall *versus* Rolle. In Chancery, before Lord Hardwicke, assisted by Lee Chief Justice B. R. Parker Chief Baron of the Exchequer, and Burnett, one of the Judges of the C. B.

Mortgage of goods and choses in action, is fraudulent as against creditors, if the goods, &c. be not delivered to the mortgagee.

WHO delivered their opinions *seriatim* upon the 27th of January, and unanimously gave judgment, that if a man mortgages his goods and chattles and debts for a valuable consideration, and the mortgagee permits the mortgagor to keep possession, and to have the ordering, selling and disposing thereof, this gives the mortgagor a false credit, is fraudulent against creditors, and the mortgagor afterwards becoming bankrupt, the assignees under the commission are intitled to have these goods, &c. for the benefit of themselves and the rest of the creditors seeking relief under the commission, and the mortgagee can only come *in* for his proportionate share under the commission.

The principal part of the case was this: That *Harvest* and *Stevens* were partners in a brewhouse at *Kingston upon Thames*, that *Harvest* for a valuable consideration mortgaged to *Potter* in trust for *Stevens* his (*Harvest's*) moiety of the brewhouse, coppers, coolers, backs, tunns, tubs, goods and chattles, and debts in the brewhouse and trade; that from thenceforth afterwards *Harvest* and *Stevens* still continued to carry on the trade together, *Harvest* appearing in every respect as much proprietor and owner as he was before he made the mortgage, having joint possession of the brewery, and acted in every thing as he had before done, and sometime afterward became a bankrupt.

The general question therefore was, whether this mortgage as to the personal estate was not fraudulent as against creditors within the statute of the 21 Jac. 1. c. 19. *sect.* 11. which enacts, "That if
" at any time thereafter any person or persons shall become bankrupt,
" and at such time as they shall become bankrupt shall by the consent and permission of the true owner and proprietary have in their
" possession,

possession, order and disposition any goods or chattles whereof they shall be reputed owners, and take upon them the sale, alteration or disposition as owners, that in every such case the commissioners under the commission of bankrupt shall have power to sell and dispose of the same for the benefit of the creditors who shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt, and for the better payment of debts, and discouraging men to become bankrupts".

It was argued at the bar that there was a great difference between a pawn of goods, and an *hipothecation* or *mortgage* thereof, for that goods *pawned* must be delivered to the *pawnee* who has no property in them, but they are only deposited as *gages* or *pledges*, but goods *mortgaged* need not be delivered. *Justin. Instit. lib. 4. tit. 6. sec. 7.* to this it was answered and resolved by the whole court, that a mortgagee of goods *moveable*, and *choses in action*, is the true owner thereof, and that therefore the same ought to be delivered to the mortgagee as much as they may, or possibly can be, that is to say, by delivering the goods themselves specifically, or the key of the warehouse wherein they are, with the possession thereof, and by delivering the muniments, books and writings relating to the *choses in action*, and enabling the mortgagee to reduce the same into possession by action or suit. And as this has not been done in the present case, and *Harvest* still appeared to be the reputed owner of the *moveable goods*, and *choses in action*, the whole court adjudged the mortgage to be fraudulent as aforesaid, and Lord *Hardwicke* decreed accordingly.

Rex versus Phillips. B. R.

A Rule was made by consent to try the validity of a *by-law*, and that if the *by-law* should be found to be a good one, then the judgment upon the information should be entred for the prosecutor, if bad, then for the defendant. It was found to be a bad *by-law*; and now it was moved that there might be no costs; but *per totam curiam*, The judgment must be entred according to the rule, and costs follow of course.

Costs where there is a trial by consent.

Brewster versus Capper. B. R.

DEFENDANT pleaded a *misnomer* in *abatement*, which was after an *imparlance*, thus: "At which day came *Ham John Crapper* (the defendant's true name) who is sued by the name of *John Capper, &c.*" to which the plaintiff demurred; and objected that this plea being in *abatement* ought to have been pleaded

What shall be a special *imparlance* in pleading *misnomer* in *abatement*.

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of the same term with the declaration, or after a *special imparlance*, and that this is after a *general imparlance*. But *per curiam*, This *imparlance* by the true name is *special* for this purpose, but if he had said *venit prædict* *John Capper* it had been bad, for that would have confessed that *John Capper* was the true name. *Kelw. 93. b.* Judgment for the defendant.

Wolfe *versus* Collingwood. B. R.

Although the sheriff takes a bail bond on the stat. H. 6. yet that is at his peril, and the plaintiff shall not be thereby concluded.

COMMON rule upon the sheriff of *Surry* to bring into court the body of the defendant. Mr. *Smythe* the King's counsel moved to discharge this rule, alledging that the sheriff had taken a bail-bond which he was obliged to do by the *stat. Hen. 6.* and had permitted the defendant to go at large, and could not by law take his body again and bring it into court.

Lee C. Justice: The sheriff must either bring in the body or justify good bail in court, for the plaintiff is not to be concluded by the act of the sheriff.

Dennison Justice: The sheriff takes the bail at his peril upon the *stat. H. 6.* so the court refused to discharge the rule.

Harris *versus* Evans. In Scacc'.

Lease for one year, and so for two or three years, as the parties shall agree.

PER curiam, A lease to hold to *R. Harris* from *Michaelmas* for one year, and so for two or three years, or any further term of years, as the said *N. Evans* and *R. Harris* shall think fit, and agree from and after the expiration of the said term of one year, is a lease for two years, and after every subsequent year begun, is not determinable till that be ended, like 2 *Salk. 414.*

Evans *versus* Underwood. B. R.

What is a negotiable note within the stat. 3 & 4 Ann. c. 9.

ACTION upon a promissory note brought by *Evans* the indorsee against *Underwood* the drawer: The note set out in the declaration is, "I promise to pay to *George Pratt*, or order, eight pounds, upon the receipt of his the said *George Pratt*'s wages due from his Majesty's ship the *Suffolk*, it being in full for his wages and prize-money, and short allowance money for the said ship;" the indorsement by *Pratt* is set out, and it is averred that the defendant received the said wages from the said ship. Upon *non assumpsit* pleaded, the jury gave a verdict for the plaintiff; and now

it was moved in arrest of judgment, that this note was not negotiable within the *stat. 4 & 5 Ann. c. 9.*

Mr. Hume Campbell for the plaintiff, to shew this was a negotiable note cited several cases, and principally relied upon *Andrews v. Franklin*, which was in Hilary term 3 Geo. 1. in this court; case upon a promissory note to pay money within two months after the ship called the *Devonshire* should be paid off, and the plaintiff declared upon the statute; it was there insisted that the note was not negotiable, the promise to pay being upon a contingency which might never happen; *Sed per curiam*, The paying off the ship was morally certain, and the note is within the statute and negotiable. And in *Coleban v. Cooke*, Mich. 15 Geo. 2. in C. B. J. Cooke on 27th of May 1732. made a promissory note, whereby he promised to pay to H. Denbam, or order, 150*l.* six weeks after the death of his father J. Cooke, Esq; for value received, which was indorsed to Coleban; J. Cooke the father died April 2, 1741. and the indorsee brought an action, and had judgment in the Common Pleas, that the note was negotiable after three arguments, for there was no contingency whereby the note might never become payable, and was only uncertain as to the time; and the judgment of the C. B. was affirmed upon a writ of error in B. R. Mich. term. 18 Geo. 2. and the court said ^{2 Stra. 1217.} that no certain precise form of words are necessary to be used in a bill of exchange or note of hand, and that "I promise to be accountable to A. or his order, for 100*l.* value received," would be a good negotiable promissory note.

On the other side it was said by Mr. Ford for the defendant, that the case of *Andrews* and *Franklyn* was never determined, and that in the case of *Coleban v. Cooke*, the payment was certain in all events, for the father must die some time or other, but it was uncertain whether the ship *Suffolk* would ever be paid off or not.

Lee C. Justice: The case of *Andrews v. Franklyn* is very like the ^{1 Stra. 24.} present; we will look into that case and see whether it was determined; the court inclined to give judgment for the plaintiff, and after looking into the case cited, did so, *ut audivi.*

Traverse *versus* Buckley and his Wife. In Chancery
before Lord Hardwicke, assisted by Sir John Strange,
Master of the Rolls.

If a bill be brought against baron and feme, and she alone be taken by process of contempt, and afterwards enters her appearance, and prays time to answer without her husband, this is regular.

THIS is a bill exhibited against husband and wife, who are joint administrators in her right of the goods and effects of her former husband, for an account of his personal estate, &c. Upon the 6th of October last both the defendants were served with a *subpœna* in France, the husband continuing abroad, the wife comes into England, and for want of an appearance is taken up by process of contempt, which issued against them both; she being a prisoner gave a bail-bond for her appearance, and applied for time to answer, which was refused, unless she would enter her appearance with the register, which she accordingly did, and thereupon had time to answer separately without her husband.

It was moved on her behalf that it is irregular to take up a *feme covert* upon an *attachment* to compel her to appear separately; and secondly, That her subsequent appearance shall not hinder her from taking advantage of the irregularity.

Mr. Attorney General for Mrs. Buckley: A *feme covert*, except in very particular cases, (where she is *separately* interested) cannot act either for herself or husband, but where both are parties the husband can appear for both, her acts alone cannot affect him; and although she be executrix or administratrix, she can do no act without him, because if she could she might thereby make him subject to a *devastavit* and she could not be answerable for it. If an action be against the wife *only*, then she may appear and the husband may take advantage of it; but if they be *joined* in the action the husband is to do every act in the court of justice where the action is; the husband shall have all her property during the coverture, and her answer in the present cause without her husband will be nugatory, for no decree can be made against *her alone*; and I therefore insist that this appearance by the wife *alone* is void in point of law, and the *attachment* against her is irregular, and therefore the taking the bail-bond was under a *duress* much greater than a *duress* in a private case, as being done under the sanction of this court.

2dly, It is objected for the plaintiff, that the *feme* by appearing and praying time to answer, has waived all advantage she might have taken of the irregularity, (if it be one:) to this I answer, that her answer in this case without her husband will not (even) bind herself, much less can the court make any decree thereon to bind her husband.

On the other side it was said for the plaintiff, that the *feme covert* having entered her appearance, and prayed, and had time to answer, the question now, is not how far the plaintiff can go on, or the court can proceed to a decree, but whether this court can discharge her from these acts of her own?

This court is often under great difficulties by reason of the non-residence of parties in the kingdom, and therefore it will take all reasonable and equitable methods of extending its process for relief of suitors; and this is the more requisite to be done in this court where the parties to a suit are frequently more numerous than in the law courts, where they are seldom so; and it is every day's practice, in this court, to suggest in the bill that some of the parties are beyond sea, and you cannot compel them to appear, and to proceed against them and the *rest* upon *that* allegation. The cases of *Bell and Hyde*, *Eq. Ca. Abr.* 65. and *Dubois v. Hole*, shew that this court ought to extend its process as far as possible to compel appearance.

And of this opinion was the *Lord Chancellor* and *Master of the Rolls*, and held the process of contempt regular and the appearance of the wife good both at law and in this court; to prove which, *Lord Chancellor* cited *Styl.* 475. *Att Lee v. The Lady Baltinglas*; and 1 *Salk.* 114. *Carpenter v. Faustin*, shews that an appearance entered for the wife without the husband is not void, and if she alone be arrested she shall not be discharged, but upon common bail, and then new process shall go against the husband with an *idem dies* given to the wife; so is 1 *Mod.* 8. The *Master of the Rolls* cited *Norwood v. Stevenson*, *Pasch.* 10 *Geo.* 2. where the husband refused to appear for his wife; she was brought in, in custody by a *babeas corpus*, and removed to be delivered to *John Doe* and *Richard Roe*, which is tantamount to an appearance, and it was granted and she discharged; this case proves that an appearance for the wife alone is not void in law.

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Easter

Easter Term

23 Geo. 2. 1750.

Anonymous. B. R.

An agent's
bill cannot be
taxed.

APPPLICATION being made to a Judge for an order to tax an attorney's bill, he made an order for the taxation thereof, upon the usual undertaking to pay what should appear to be due thereupon; the person who obtained the order attended the master several times, but the attorney, whose bill it was, never attended; and the master refused to tax the bill *ex parte*, because it was a bill for *agency*; and now Mr. *Lawson* moved that the Master might tax it *ex parte*; but *per curiam*, It is not within the act of parliament; and the Master said he never taxed a bill for *agency* in his life, so the Judge's order was held to be irregularly obtained.

Lamii *versus* Sewell. B. R.

A foreigner is
not bound to
give security
for costs.

THE plaintiff resides at *Dunkirk*, and is a merchant there: Mr. *Bennè* moved he might give security for costs, or that the proceedings might stay until he did so. *Sed per curiam*, This was refused, because it would affect trade, and be excluding foreigners from obtaining justice in our courts, and is never done but in actions *qui tam*, &c. And they cited *Plumtree v. Mason*, wherein this was refused.

Rex *versus* Episcopum Eliensis. B. R.

Where it is
doubtful who
is the visitor
of a college,
the court will
not grant a
mandamus,
nor has it
been ever de-
termined
whether a
mandamus lies
to a visitor of
a college.

RULE to shew cause why a *mandamus* should not go to the *Bishop of Ely*, commanding him to hear an appeal made to him as visitor of *Trinity college in Cambridge*, by Doctor *Edward Vernon*, who has therein complained that he has been wrongfully deprived of his senior fellowship in the college, contrary to the statutes thereof, made upon affidavits that the *Bishop* declined hearing the appeal until he could be satisfied that he had a right to visit the college.

Upon

Upon shewing cause Doctor *Vernon* grounded the *Bishop's* right to visit upon a body of statutes given to the college by *Ed. 6.* for the government thereof, wherein among other things the *Bishop of Ely*, for the time being, is to be the visitor of the college, and Doctor *Vernon* swears in his affidavit that he believes these statutes of *Ed. 6.* are the statutes which are binding upon the college, and to a true copy of them taken out of a book in the hands of the *Bishop*, which appears to be signed by the King and his commissioners, but has not the great seal to it.

On the other side against a *mandamus* it appeared to the court that these statutes of *Ed. 6.* have never been put in ure; that the *Bishops of Ely* for 200 years last past have not visited this college; that these statutes are no where inrolled, that another body of statutes were given to the college by *Queen Eliz.* in which those of *Ed. 6.* are not taken notice of, although contradictory in many instances; the college annually on the 16th of *December* commemorate their founder and benefactors, and among the rest the preacher from the pulpit only says of *Edward the 6th* that he confirmed his father's grant, but when he comes to *Queen Elizabeth* he says, "she gave us the statutes by which we are governed". Besides, all the members of the college take an oath that they will observe and keep the statutes of *Queen Elizabeth*; and the book of the statutes of *Ed. 6.* nor any copy of it, is to be found among the archives of the college, nor does it appear they were ever received by the college, or that the *Bishop of Ely* has ever acted as visitor.

Lee Chief Justice: It appears from the affidavits laid before the court that there has been an appeal to the *Bishop of Ely* as visitor; that the *Bishop* has declined exercising any visitatorial power in order to take the opinion of this court whether he has any right to exercise it, and the affidavits only go to belief that the bishop is visitor; on the other side it appears that these pretended statutes of *Edward 6.* are found in the hands of the *Bishop*, without the great seal, and not in the college, and that the *Bishop* never visited the college, and this is to induce a belief that there are no real statutes of *Ed. 6.*

This is a controverted question, and it is not at all clear to the court who is visitor; and if we had seen and read all the statutes of this college, we have no authority to determine who is visitor, that being the proper province of a jury.

I shall give no opinion whether a *mandamus* to a visitor of a college be proper in any case whatever, it being a question which has never yet been determined; *Usker's case*, 5 *Mod.* 452. comes the nearest to the present case, wherein the then most eminent counsel of the bar were concerned. Serjeant *Wright*, (afterwards Lord Keeper)

er) *Cooper* and *Pratt* for the *mandamus* to a visitor of university college in *Oxford*, and *Northey*, *Harcourt*, and *Sir Barth. Shower* against it; and though the court was moved several times, yet at last they would do nothing in it.

It is well known that this court cannot grant a *mandamus* to compel any person to exercise a jurisdiction, which that person is not most clearly and certainly appointed to, and bound by law to exercise; and it would be most unjust to grant a *mandamus* to the *Bishop* in this case, who seems to decline the right of being visitor; for if he really has no jurisdiction he might be put to great trouble and expense by a *prohibition*. This is not like application to be admitted into corporations to try particular rights, but is to command a man to exercise a jurisdiction which he himself knows not whether he has any right to it or not; and no instance can be found where the court ever granted a *mandamus* to a person to exercise a jurisdiction, which it was doubtful whether he had power to exercise or not, and therefore I am of opinion the rule ought to be discharged.

Wright Justice *ad idem*.

Dennison Justice: This case is very different from the cases of *mayors*, &c. for if it appears doubtful whether a man be duly elected *mayor* or not, the court will grant a *mandamus* to try it. I shall give no opinion whether a *mandamus* in any case ought to go to a visitor of a college, but Judges have always been disposed not to meddle with these private donations.

If we grant this *mandamus* we must suppose the *Bishop* is visitor; when such a supposal may be false, for the *Bishop* does not tell us he is visitor; and if we should grant the writ and the crown be visitor, might not the *Attorney General* come for a *prohibition*, so that this court would be acting most absurdly by commanding and prohibiting a man to exercise one and the same jurisdiction; why then does not the *Bishop* proceed to determine upon the appeal, and if the crown has a right as visitor the *Attorney General* may come for a *prohibition*, and the matter may be properly tried.

Foster Justice *ad idem*.

Rule discharged.

Simmonds *versus* Middleton and another, the bail of
Parminter. B. R.

THIS was an action by original writ wherein the plaintiff obtained judgment against the principal, which was affirmed upon a writ of error in the house of Lords upon the 22d day of February 1748. Practice.
In regard to
proceedings
against bail.

Before the writ of error was brought, *viz.* on the 26th of April 1748. a *capias ad satisfaciendum* was left with the sheriffs of London in order to have a *non est inventus* against the defendant Parminter returned thereupon, and to ground a *scire facias* against the bail; on the 27th of the same April the writ of error was allowed, and notice thereof given the 30th, which depended in the house of Lords until Feb. the 22, 1748. when the judgment was affirmed, whereupon the plaintiff sued out a second *ca. sa.* against Parminter, tested the 13th of February 1748. returnable the first return of Easter term 1749. Parminter then filed a bill against the plaintiff in the Exchequer, and thereupon obtained an injunction, which was not dissolved until December last, when the plaintiff sued out the first *scire facias* against the bail, tested the last day of last Michaelmas term, and returnable the first return of last Hilary term, whereupon a *nichil* was returned, and thereupon the second *scire facias* against the bail was sued out, tested the first day of Hilary term last, and returnable on the octave of the purification, which was the 9th of February, and the defendants (the bail) not appearing, a *nichil* was also returned upon that writ, and upon the last day of last term the bail came late at night and obtained a rule for the plaintiff to shew cause why the *ca. sa.* against the bail and the proceedings on the *scire facias* should not be set aside.

And now upon shewing cause, the court held the first *ca. sa.* sued out before the allowance of the writ of error was regular, although the sheriffs could not have arrested Parminter thereupon after notice of the writ of error; and as it appears that the first *ca. sa.* is now returned *non est inventus*, we will suppose it might be so returned after the writ of error was spent, nothing appearing to the contrary, and therefore it is regular; as to the 2d *ca. sa.* we have no occasion to say any thing upon that, here appears one *ca. sa.* regularly issued, returned and filed, and that is sufficient to ground the *scire facias* against the bail, and therefore the rule must be discharged, which was accordingly discharged upon the 6th of May 1750. and the same day execution was awarded against the bail, although they surrendered Parminter in discharge of themselves

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selves

themselves upon the same 26th of May after the rising of the court before a Judge at his chambers.

Bail must render the principal the quarto die of the return of the second scire facias before the court, or they come too late afterwards, even the same day.

And thereupon the bail came again to the court this term, and obtained a rule to shew cause why the award of execution against them should not be set aside for irregularity, upon an *affidavit* that the principal was rendered to prison upon the very day whereupon the former rule to quash the *scire facias*'s was discharged, and upon an *affidavit* that they had the defendant *Parminter* ready to be surrendered at the hall the last day of last *Hilary* term, in case the court had not then made the said rule to shew cause why the *scire facias*'s should not be quashed; *Sed per curiam*, The bail are now fixed absolutely with the damages and costs, for they ought to have rendered the defendant upon the 26th of May, sitting the court, and they came too late to a Judge's chambers after the court was risen; and in strictness as the proceedings are regular, they were fixed upon the *quarto die* of the return of the 2d *scire facias*, which was the last day of last term after the court was risen; and so the rule to shew cause why the award of execution should not be set aside, was also discharged.

Thrustout of the demise of Small *versus* Denny and others. In C. B.

Baron seised in fee of lands in A. and feme seised in fee of lands in C. before marriage settle the whole to the baron for life, remainder to the feme for life, remainder to the children of the marriage for such estates, &c. as the feme shall appoint, and for want of

EJECTMENT, of lands in *Swilland* in the county of *Suffolk*; upon the trial the following case was made for the judgment of the court: That *Henry Tampion* being seised in fee of certain lands in *Somersham* in the county of *Suffolk*, and *Mary Hammond* being seised in fee of lands in *Swilland* (being the lands in question) by indentures of lease and release of the 23d and 24th days of June 1727. in consideration of a marriage then shortly afterwards to be had between the said *Henry* and *Mary*, did release and convey unto *James Hailes* and *Samuel Dynes* and their heirs the lands in *Swilland* now in question, and the lands in *Somersham*, to the uses following, (that is to say) as to the lands in *Swilland*, to the use of the said *Mary* in fee, until the solemnization of the said then intended marriage, and as to the lands in *Somersham* to the use of the said *Henry* in fee until the solemnization of the said marriage, and from and after such appointment, to the children equally and their heirs as tenants in common, and for want of such issue, to such persons and uses as the feme shall appoint, and for want of such appointment as to the lands in C. to the heirs of the feme, and as to the lands in A. to the heirs of the Baron. Baron dies leaving one son only, the feme appoints the whole to him by her will, but if the son dies without issue, and under 21, she appoints the whole to strangers; he dies under age and without issue; this is either a good appointment, or if it be not, is a good executory devise of the feme's resulting use in the lands in C. and therefore quacung; via data, the heirs on the part of the feme have no title to the lands in C. But if the appointment be bad, the heir ex parte the Baron has title.

after

after the marriage, then as to all their lands both in *Swilland* and *Somersham* to the use of the said *Henry* for his life, and after his decease to the use of the said *Mary* for life in bar of dower; and after the decease of the survivor of them, then to the use of such child and children on the body of the said *Mary* by the said *Henry* to be begotten, and for such estate and estates, and subject to such powers, provisoes, conditions and limitations as the said *Mary*, notwithstanding her coverture, shall by any writing under her hand and seal, or by her last will and testament in writing, attested by three or more credible witnesses, limit, direct and appoint the same; and for want of such limitation, direction and appointment, to the use of all such children on the body of the said *Mary* by the said *Henry* to be begotten, and his, her and their heirs, equally as tenants in common; and for want of such issue, to the use and behoof of such person and persons, and for such estate and estates, and under such provisoes, conditions and limitations, and in such sort, manner and form, as the said *Mary Hammond*, during her said coverture, or at any other time, and as well married as sole, shall, in and by her last will and testament, or by any other writing or writings, deed or deeds, under her hand and seal attested by three or more credible witnesses, give, order, dispose, declare, limit or appoint the same, or any part thereof; and as the said estates so to be appointed (if any shall happen to be) shall respectively end and determine, and for want of such gift and appointment, then as for and concerning the premises in *Swilland*, (now only in question) with the appurtenances, or so much whereof no such disposition shall be made, to the use of the right heirs of the said *Mary* for ever, and as for and concerning the lands in *Somersham*, or so much thereof, whereof no such gift or disposition shall be made, to the use of the right heirs of the said *Henry Tampion* for ever: That the said marriage soon afterwards was had, and *Henry Tampion* thereupon entred into all the lands and was seised under the settlement, and died in 1729. seised of the lands both in *Somersham* and *Swilland*, leaving the said *Mary* his wife and one only child by her, *Henry*.

That *Mary* the widow upon the death of her husband entred into all the lands both in *Somersham* and *Swilland*, and was seised thereof under the said settlement; and being so seised, by her will of the 25th of November 1733. properly attested, gave and devised unto *Henry Tampion* her son and his heirs for ever, all the lands in *Swilland* and *Somersham*; but in case her said son should die before his age of 21 years, and without issue, then she gave the said lands in *Swilland* to her brother *Joseph Clarke* and *Ann Procter* her sister, the wife of *Boycott Procter*, and to their heirs for ever, as tenants in common; and upon the like contingency she gave the lands in *Somersham* unto *Bearcroft* and *Hailes*, and their heirs, as tenants in common.

That

That the said *Mary* having so made her will died seised of all the lands in *Swilland* and *Somersham* in 1733. leaving her son and only child *Henry* an infant.

That *Henry* the son upon the death of his mother entred into all the lands in *Swilland* and *Somersham*, and was seised thereof as the law requires, and afterwards in the year 1738. died seised thereof, under age and without issue.

That *Small* the lessor of the plaintiff is heir at law to *Mary* the mother of *Henry the son*, and heir to *Henry* the son on the part of his mother, and the defendants claim title and are in possession of the lands in *Swilland* now in question under the will of *Mary*.

After several arguments at the bar, the court gave judgment for the defendants, and were all clear of opinion that whoever had title to the lands in *Swilland*, the heir of *Henry* the son *ex parte materna* had none.

Many objections were taken to this appointment to *Clarke* and *Proctor* upon the contingency of *Henry* the son's dying without issue and under age, as not being warranted by the power under the settlement, but the whole court agreed that if it could not operate as an execution of the power under the settlement, yet it was good as an executory devise to pass all the mother's interest, and therefore they said if the lessor of the plaintiff claimed by descent as heir to the mother *Mary*, she had devised her estate away, (if she had any) and if the limitations to *Henry* and his heirs took place under the settlement for want of appointment, *Henry* the son, in that case, would take a fee by purchase, and then his heirs on the part of his father would have title, so that it was impossible that the lessor of the plaintiff as heir on the part of the mother could have any title.

But although the court held this to be a clear case against the plaintiff, and that the defendants being in possession intituled them to have judgment, yet they doubted how far their title could be maintained if they had been plaintiffs in this ejectment, or if the question had now been between them and the heir on the part of the father.

This doubt arose upon the limitation in the settlement after the wife's estate for life, "To the use of such child and children on the body of the said *Mary* by the said *Henry* to be begotten, and for such estates, &c. as she should appoint"; and upon the argument for the plaintiff it was contended, that as there was issue of the marriage, the conditional appointment over to strangers was not made in strict pursuance of the power, and was therefore a void execution thereof; that all powers are to be strictly pursued; and the only

only power given to the mother, in this case, was, to distribute the estate among the children, if there should happen to be more than one, in such proportions as she thought proper; that she might give an estate to one for life, to another in tail, and to a third in fee, but that she was obliged to depart with the *whole fee-simple* among them, and if there was only one (which was the case) that she must give the *whole* to that one, and had not power to limit a partial fee as she has done; this was compared to a case which frequently happens in courts of equity, where a sum of money intended as a provision for younger children is left to the distribution of a father or mother to be proportioned as they think proper, in which case it was insisted that when there is only one child, that child would in equity be intitled to the whole.

It was further insisted, that the manifest intention of this settlement appeared to be, that the children of the marriage should, at all events be provided for, after the death of the mother, and that this intention would be intirely defeated if the mother should be construed to have had a power to appoint to an only child a less estate than an absolute fee-simple, for she might then have given him an estate for years, or for a day only, and so leave him totally unprovided for; to this it was answered, that if there were more children than one it was agreed that the mother might appoint to which she pleased the whole fee-simple, in which case she would leave the rest without any provision at all, and therefore it could not be the intention of the settlement that all the children should be provided for in all events; that in this case however the mother had made a sufficient provision for the child, for *Henry* the son was by the devise to take the whole fee-simple absolutely, unless he died without issue and under 21.

It was further contended for the plaintiff, that if the power was not properly pursued, *Henry* the son in this case could not take an estate in fee by the next limitation for want of such an appointment, which is "to the use of all such children on the body of the said *Mary* by the said *Henry* to be begotten, and his, her and their heirs equally as tenants in common; and for want of such issue, &c." for that the words in the settlement "*for want of such issue*", restrained the estate to the children, and their issue, and made it an estate-tail; that therefore as *Henry* the son died without issue, the plaintiff had title as right heir of *Mary*, for that this was not a good will to pass any future interest by way of executory devise.

But as to these two points it was resolved by the court, first, That this was a good executory devise, as it depended upon a contingency to arise within the compass of a life then in being; and 2^{dly}, That the meaning of the words "*for want of such issue*" in the settlement,

ment, was only that the limitation to the children and their heirs could only take place for want of the wife's appointment under the first power, and that the next power given to the wife could only take place for want of issue of the marriage; and *Burnett* Justice declared that these words did not create an estate-tail, but only made the wife's second power of appointing depend upon a contingency with a double aspect.

No opinion was given upon the question as to the validity of this appointment, as *that* could no way affect the present plaintiff, but could only be a question between the heir of the part of the father, and the devisees, for if the power was so far illegally pursued as to let in the next limitation to the children and their heirs for want of an appointment, then the heir *ex parte paternâ* would have title, but if it was so far well executed as to prevent the subsequent limitation from taking place, the remainder of the estate would either go over with the last limitation of the fee to *Mary*, or what is not settled in the release would be vested in her by way of resulting use as to the lands in question; in either of which cases the title would be in the devisees. The court gave judgment for the defendants, and ordered the *posse* to be delivered to them, and that the plaintiff should pay them costs of a nonsuit.

N.B. *John Tampion* the eldest brother of *Henry Tampion* the father, uncle to *Henry* the son and heir at law to them both, brought an ejectment in *C. B.* for all the lands both in *Somerham* and *Swilland*, which was tried at the *Lent* assizes at *Bury* in 1743. and by the consent of the parties a case was made upon the very same settlement and will for the opinion of Mr. Justice *Burnett*, before whom the case was argued at his chambers, and he was of opinion as to the lands in *Somerham* which moved from *Henry Tampion* the father, and whereof *Mary* could have no resulting use, that she had no power to dispose thereof, and determined that *John Tampion* the heir both of *Henry* the father and the son should recover the lands in *Somerham*; but as to the lands in *Swilland* he was of opinion that if it was a doubt whether her appointment over was good or not, yet that as they moved from her, she had a resulting use therein upon the death of *Henry* the son without issue and under age, which she had power to dispose of, and as to those lands gave his opinion for the devisees, that they took them by way of executory devise of her resulting interest; but notwithstanding this opinion of a single judge, *John Tampion* has since brought another ejectment in *B. R.* for the lands in *Swilland*, which was tried at *Bury* summer assizes 1746. when a case was made as above for the opinion of the court of *B. R.*

See the 2d
Vol. of these
Reports 336,
337. *Roe v.*
Dunt.

Neal, of the demise of the Duke of Athol, *versus*
Wilding & al'. B. R.

IN ejectment, after a special verdict and three solemn arguments it was adjudged by the whole court that where tenant in tail male the reversion in the crown (*anno* 5 Hen. 8.) before the *stat.* 34 & 35 Hen. 8. suffered a common recovery with single voucher, the recoveror thereby gained a *base fee* which will be determinable whenever there shall be a failure of issue male, that this *base fee* is descendible and alienable, that the issue in tail are thereby completely barred, and the ancient reversion is still in the crown, which may come into possession and take place whenever there shall be a failure of issue.

Tenant in tail of the gift of the crown, the reversion in the crown, suffers a common recovery before the 34 H. 8. he gains a *base fee*, descendible and alienable so long as there is

issue in tail, and the reversion is still in the crown. Bro. Tail 41. Cro. Car. 430. Plowd. 555. a. dit. per Manwood. 1 Leon. 85. as to remitter.

The lands in question were part of the lands which Hen. 7. granted to Sir Thomas Stanley in tail male, whereof Thomas his grandson Earl of Derby suffered the common recovery, 5 Hen. 8. and thereby gained a *base fee*, which descended to Charles Earl of Derby, who (after *stat.* 4 Jac. 1. touching the estates and controversy in the Derby family) levied a fine of the lands in question, under which the defendants claim as purchasers of the *base fee*.

The court resolved that the *stat.* 4 Jac. enacted with the consent of the parties therein mentioned, made no alteration in the *base fee*, which was then in existence; that the crown or parliament gave nothing thereby, but only by consent of the family new modelled the *base fee*, which is descendible and alienable so long as their are heirs male of the family.

The lessors of the plaintiff claim under a family settlement confirmed by parliament by the said private *stat.* 4 Jac. 1. and it was contended that by that statute these lands in Brotherton in Lancashire were made unalienable by the issue in tail; that in case of a deed, it was admitted it would have been otherwise; but the court resolved the contrary as afore is said.

It was objected that the verdict found the fine was levied *tempore* A fine is found by a verdict, to be levied before the justice of the court of the county palatine of Lancaster, the court will presume they were justices who had power to take the fine.

them

them to be such justices as had power by statute to take fines in the county palatine, as the contrary does not appear.

The recovery here in 5 Hen. 8. makes the difference between this case and *Murray v. Eyton*, T. Raym. 338. Sir T. Jones 237. S.C. there was no recovery, only a fine by tenant in tail with reversion in the crown, after stat. 34 Hen. 8. Judgment for the defendants.

Trinity Term

24 Geo. 2. 1750.

Beck, on the demise of Hawkins, *versus* Welsh. B.R.

Tenant in tail mortgages for years, becomes bankrupt and dies without suffering a common recovery, the assignee of the bankrupt shall have the estate clear of the mortgage by the stat. 21 Jac. 1. c. 19. s. 12.

EJECTMENT, verdict for the plaintiff subject to the opinion of the court upon this short case; *Thomas Grundy* being seised in fee tail of the lands in question, made a mortgage thereof to the defendant for a term of 500 years, without having suffered a recovery, and afterwards became a bankrupt, and died before the bringing this ejectment; the lessor of the plaintiff is the assignee under the commission of bankrupt, and claims title under the stat. 21 Jac. 1. c. 19. sec. 12. which enacts, "That the commissioners of bankrupt shall have power by deed inrolled, to grant and sell all manors, lands, tenements or hereditaments whereof any bankrupt is, or shall be seised of any estate tail in possession, reversion or remainder, for the benefit of the creditors of such bankrupt. And that such grants and sales shall be good in law against such bankrupts, the issues of their bodies, and against every person claiming any estate, right, title or interest under such bankrupts, and against every person whatever whom such bankrupts, by common recovery or otherwise, might cut off or bar from any remainder, reversion, rent, profit, title or possibility into, or out of any the said manors, lands, tenements or hereditaments.

This case was twice argued at the bar, and two questions were made; 1st, Whether, if *Thomas Grundy* had suffered a recovery, it would not have let in this mortgage for 500 years?

2^{dly}, Whether the statute does not operate as a common recovery to all intents and purposes?

As to the first question it was resolved by the court clearly, that if tenant in tail makes a lease or mortgage for years, or charges the land with any other incumbrances, and afterwards suffers a common recovery, that shall let in all the incumbrances; and the reason is, that whatever act binds the tenant in tail himself, shall bind the recoverors, or the person or persons to whose use the recovery is suffered; for he who recovereth cannot say that he against whom he recovered had but an estate in tail. *Poph. 5, 6.* and the court said this is the law beyond all doubt.

But if he had suffered a recovery it would have let in the mortgage and other incumbrances.

As to the 2d question, They held that the statute of 21 Jac. 1. c. 19. s. 12. was made for the benefit of creditors who had no specific lien upon the lands of a bankrupt, and not for any particular creditors who relied upon the title they accepted of; that tenant in tail without suffering a recovery could only affect the estate for his life, and he being now dead the mortgagee's title is at an end, and this statute never intended to put the prior incumbrancers on an estate-tail in a better case than they would otherwise have been if the statute had never been made; it would be very strange to say that this statute which was most plainly made for the general benefit of all the creditors should have an effect which is quite contradictory thereto, viz. to make good a defective title to a particular creditor, it is impossible the legislature could ever intend any such thing so without saying any more; though this be a new case, yet we are all clear of opinion that judgment must be for the plaintiff.

Gunn versus Mackhenry. B. R.

THE plaintiff levied a plaint in an action of debt in one of the courts of the city of London for goods sold, board and necessities, made an affidavit that 30*l.* was owing to him from the defendant, and held him to bail, and declared in the city court in debt upon a *concessit solvere* according to the custom of the city.

Plaintiff declares in the city court in debt on a *concessit solvere*, the cause is removed by *ha. cor.* and he declares here in case, yet he shall not lose his bail, for it is the same cause of action.

The action being removed into this court by *habeas corpus*, the defendant puts in bail above, and the plaintiff declares here *de novo* in an action upon the case upon several promises, proceeds to final judgment, and to a *scire facias* against the bail; and now it is objected on behalf of the bail by Mr. *Hume Campbell*, that the original

plaint

plaint below being in an action of *debt*, and the plaintiff having declared here in *case*, has thereby lost his bail. *Sed per curiam*, This is the very same cause of action, and if the plaintiff had declared here in debt upon a *concessit solvere*, the defendant might have waged his law, which he could not have done in the city court; and we are all of opinion the bail are liable.

Chester *versus* Upsdale. B. R.

Q. Whether a game-keeper to a peer be privileged from arrests.

THE defendant being arrested for a debt at the plaintiff's suit, moved the court to be discharged out of custody upon common bail upon his own *affidavit* only, wherein he swears that he entered into the service of Lord *Willoughby de Brooke* in June last as his game-keeper of his manors in *Somersetshire*, and has ever since continued, and now is in his Lordship's service, and that by order of his Lordship he had been attending him in several counties in *England*, and is charged with business he has to be done for his Lordship, which he swears he cannot execute because he is detained by the arrest.

Per curiam, Before the *stat. 12 & 13 W. 3. c. 3.* the way was for persons intitled to privilege of parliament to sue for such writ, and in *Pitt's case*, *Comyns* 444. although the Judges were of opinion that he was intitled to privilege of parliament, and discharged him upon motion, yet Lord *Hardwicke* Chief Justice then expressed himself to this effect: "I desire it may be understood, that we do

Vide Clarendon's Hist. Rebell. lib. 4. fol. 397. 4to Edit. anno 1705.

"not determine that the court is bound, in every instance of this kind that may hereafter happen, to discharge persons (who may claim privilege) upon motion, without a writ of privilege, but we hold it discretionary in the court, either to proceed by this method, or by writ, as the nature and particular circumstances of the case shall appear to induce the legal discretion of the court." And this brings us to consider, whether in the present case there is sufficient evidence laid before the court to induce us to grant this motion; and we all think there is not; for if the defendant is really and truly in the service of Lord *Willoughby de Brooke*, and is necessarily employed about his estates and manors, there ought to be an *affidavit* laid before us *what*, and *where* those estates are, and that his Lordship is in possession of such estate or manor, and that the defendant is game-keeper in such manor; we give no opinion whether this defendant is intitled to privilege of parliament or not; but by an order of the house of Peers of the 28th of June 1715. which seems to be a declaration of their privileges, we conceive that that order does not extend to privilege all their menial servants from arrests, but only such as are necessarily and properly employed about their estates, and about their persons; that therefore as this is the sense

of the Lords themselves of their own privileges, we ought to have proof laid before us that this defendant is necessarily and properly employed about the estate of Lord *Willoughby*; and therefore the rule to shew cause why common bail should not be accepted must be discharged. *N.B.* Lord *Willoughby de Brooke* sat in court while this motion was made and debated, *with his hat on*, upon the bench next to the junior Judge, and after the motion was over, stood up with his hat still on, and spoke something to the court which I could not hear; but I heard Lord Chief Justice *Lee* tell him, (with some warmth) that he did not behave with proper decency to the court; whereupon Lord *Willoughby de Brooke* begged pardon of the court, and pulled off his hat.

Rollin versus Mills. B. R.

ACTION upon a foreign bill of exchange; and in order to hold the defendant to special bail, one *Peter T.* of *London*, merchant, maketh oath, that the defendant *Mills* is indebted to the plaintiff *Rollin* in a certainailable sum of money by virtue of a bill of exchange indorsed by the payee to the plaintiff, as appears by the said bill and indorsement, and that *Mills* the defendant accepted the bill, but had refused payment; that the bill was protested, and though the affidavit was positive that the defendant had accepted the bill, yet the court on hearing counsel on both sides ordered common bail, because the affidavit only swears that the defendant is indebted, *as appears* by the said bill, &c. And the case of *Mansfield v. Ferguson*, *Mic.* 16 Geo. 2. B. R. was exactly like to this; and in *Hil.* 19 Geo. 2. a third person swore that defendant was indebted to plaintiff in 800*l.* *as appeared* by an account stated under the defendant's own hand; Mr. *Henley* moved that common bail might be accepted, which was ordered accordingly on hearing the other side; and the court said that such affidavit is insufficient, when it says, "*As appears* by such a note, bill or bond, &c." and this balance of account may have been discharged for any thing this third person knows. *Vide 2 Stra.* 1226.

Bail.
What kind of affidavit shall be insufficient to hold defendant to special bail.

Ante 121, 231.

Michaelmas Term

24 Geo. 2. 1750.

Taylor *versus* Bird. B. R.

A man binds himself in a bond to leave his children 200 l. he leaves four children, and gives the eldest an estate in land, and to the other three 50 l. a-piece at 21. this is not a performance of the condition.

DEBT on a bond, defendant craves *oyer*, and sets forth the condition, which was, "That whereas a marriage is shortly to be had between *Samuel Bird* and *Mary Taylor*: Now the condition of this obligation is such, that if the said *Samuel* shall give, bequeath or leave to the said *Mary* 200 l. for her own benefit, or if the said *Mary* shall die before the said *Samuel*, he shall leave unto the child or children of the said *Mary* jointly 200 l. then this obligation to be void"; which being read and heard, the defendant goes on and pleads, that the said *Mary* is dead, and left four children, and that *Samuel Bird* by his will gave to the eldest son an estate in land of more than the value of 50 l. and to the other three children 50 l. a-piece to be paid to them as they should attain their respective ages of 21. To this the plaintiff demurs.

Per curiam, The plea is bad, for the giving the three children the several legacies of 50 l. a-piece to be paid at 21, and the landed estate to the eldest child, is not a performance of the condition; and there is a great difference between leaving the children 200 l. jointly, and giving them several legacies at 21, and it was intended that there should be a benefit of survivorship; and the land cannot survive, besides there is no present provision for the children, which was plainly intended to be made by the bond, therefore there must be judgment for the plaintiff.

The Innholder's Case. B. R.

ACTION of debt upon a *by-law*, "That every innholder being entred as a brother of the company, shall pay two shillings a year quarterly (to be applied to particular purposes for the benefit of the company) under the penalty of five shillings *per annum*;" the breach assigned is, that the defendant has for four years next before the 1st of September 1749. been entred a brother of the company, but has neglected to pay the two shillings *per annum* quarterly for the said four years, *per quod actio accrevit*. Objected in arrest of judgment after a verdict, that no particular days are assigned for the quarterly payments to be made; but *per totam curiam*, The declaration is very well; and Denison J. said it would have been good even on a demurrer. *Postea* delivered to the plaintiff.

Debt on a by-law for not paying 2 s. per ann. quarterly; the breach need not assign the days of quarterly payment.

Dale *versus* Hall. B. R.

ACTION upon the case against a shipmaster or keelman who carries goods for hire from port to port; the plaintiff does not declare against him as a common carrier upon the custom of the realm, but the declaration is, that the defendant at the special instance of the plaintiff undertook to carry certain goods consisting of knives and other hardware safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money, that the goods were delivered to the defendant on board his keel, and that the goods were kept so negligently by him that they were spoiled, to the plaintiff's damage; upon the general issue *non assumpsit*; this cause came on to be tried before Justice Burnett, and the plaintiff proved the goods were all in good order and clean when they were delivered on board, and that they were damaged by water and rusted to the amount of 24*l*. This was all the plaintiff's evidence.

A hoyman who undertakes to carry goods, must deliver them safe at all events, except damaged by the act of God, or by the King's enemies. 1 Salk. 18. 1 Vent. 190, 238.

For the defendant it was insisted at the trial, that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence that he had taken all possible care of the goods, that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in, that they pumped and did all they could to prevent the goods being damaged, which evidence the Judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant.

It was now moved for a new trial by Mr. *Clayton* and Mr. *Ford* for the plaintiff, who insisted that the evidence given for the defendant ought not to have been received.

Foster (Justice) reported that *Burnett* (Justice), was doubtful whether the evidence given by the defendant was admissible or not, and submits *that* to the court; but if it was admissible, he is very well satisfied with the verdict.

Sir *Thomas Bootle* and Serjeant *Bootle* for the defendant, insisted that this declaration not being upon the custom of the realm, but upon a particular contract, and that the breach assigned being, that by the negligence of the defendant the goods were spoiled, that therefore *negligence* is the very *gist* of this action, and the defendant has proved there was no negligence; indeed if the declaration had been, that the defendant promised to keep safely the goods as well as to carry them safely, he must have kept them safely at all events.

Lee Chief Justice: This is a nice distinction indeed; I am of opinion that the evidence given for the defendant was not admissible; the declaration is, that the defendant undertook for *hire* to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the law says, every thing is a negligence in a carrier or hoyman, that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by *the act of God, or the King's enemies*; and a promise to carry safely, is a promise to keep safely.

Wright Justice, of the same opinion.

Denison Justice: The law is very clear in this case for the plaintiff; the declaration upon the custom of the realm is the same in effect with the present declaration; in the old forms it is, that the defendant *suscepit, &c.* which shews that it is *ex contractu*; in the present case the promise to carry safely need not be proved, the law raises it, the breach is very right that he did not deliver them safely, but so negligently kept them that they were spoiled.

Foster of the same opinion; and a new trial was granted.

N. Goff v. Clinkard, tried at the sittings in *London* after last *Hilary* term, before *Lee C.* Justice, was an action against a master of a ship, who undertook to carry goods from *London* to *Amsterdam*; the breach assigned was, that a puncheon of rum was staved and lost to the plaintiff's damage; this was proved to be done by the defendant's servants in letting it down into the hold of the ship.

and though the defendant proved it was endeavoured to be let down into the hold with all possible care, yet by accident it was staved; notwithstanding this, the jury gave a verdict for the plaintiff agreeable to the directions of the Chief Justice. N. This case was cited by * Mr. Clayton in the case above.

* Lord Chief Justice of the

C.B. in Ireland at the time of publishing this book.

Rex *versus* The Borough of Midhurst. B. R.

MOTION for a *mandamus* to the lord of the manor of the borough of *Midhurst* and to the steward, to hold a court, and to the homage to attend that court and present certain conveyances of burgage tenements, which when presented will intitle the purchasers to vote for members of parliament and to other privileges there, which, it appears by affidavits, had been tendered to the homage, and rejected by them at the last annual court in *August* last.

Mandamus to the steward of the manor of Midhurst and to the homage to hold a court, and present certain conveyances to purchasers of burgage tenements, whereby they are intitled to be sworn in burgesses of the corporation, and to vote for members of parliament.

The principal objection made at the bar against a *mandamus* is, that the homage, in this case are not *ministerial*, but *judicial* officers, and that it appears to the court they have already exercised their judgment, and determined the conveyances tendered to them to be fraudulent, and therefore refused to present the same at the last court.

Lee Chief Justice: It appears to the court that this is an ancient borough consisting of bailiff and burgesses, that these persons as tenants of the manor have a right by purchase or descent to become burgesses, and are intitled to vote for members of parliament, and for the bailiff who is the presiding officer at elections, that a purchaser cannot exercise this right of voting, before his purchase deed be presented by the homage at a court to be holden for that purpose before the lord of the manor, or his steward, that these conveyances have been duly executed and tendered to the homage, and that the homage rejected the same, looking upon them to be fraudulent.

I am of opinion that the purchasers when they tendered the conveyances had *jus in rem*, viz. to be admitted burgesses, and to THE PRIVILEGE OF VOTING, which as Lord Holt said in *Ashby* and *White*, is not *minima in lege*, but a NOBLE PRIVILEGE; and I think would be a shame to the law to send these purchasers to seek remedy in another court under a pretence that their purchase deeds are fraudulent; that is a matter which we cannot take notice of, or try present, they have no remedy but by a *mandamus*, and this being a public concern, this court must grant it, and if the conveyances be not good in law, that matter may be returned. I think the purchasers are *ministerial* in this case; this is a particular authority lodged in

in certain persons by the custom of the manor respecting the *public concern* of the nation, and therefore a *mandamus* must go to the homage to present the conveyances, and to the steward to hold a court, admit, and swear *in* these purchasors, burgeses of the town.

Wright Justice: I am of the same opinion, the homage has no right to say whether these conveyances be good or not, they ought to present them, and there is no other remedy unless this writ goes, no other remedy has been so much as hinted at the bar; *mandamus*'s were introduced to assist in matters of right concerning the *public*, and the maxim *est boni judicis ampliare jurisdictionem* is thereby made good; the case of *Clithero*, *Camb.* 239. is in point, but if this case was quite new, I think a *mandamus* ought to go. And one writ will do to both the *jurats* and *steward*, and to be returned by them, *reddendo singula singulis*.

Denison Justice of the same opinion: I am satisfied that the homage in these presentments do not act *judicially*, all they have to do, is to declare in court, that the land which was once the land of *A.* is now *B.*'s and is very like livery of seisin, which is no more than making a matter public.

Foster Justice of the same opinion: It is said these homagers are upon their oath, and so is every mayor of a corporation, and yet he is a *ministerial* officer in many cases; the homagers are finable by the steward of the manor; if so, surely this court can send a *mandamus* to them, and to deny the writ, would be to say there is a right without a remedy.

Rule absolute for one or more writs of *mandamus* at the pleasure of the prosecutors.

Park *versus* Yerbury, bail for Richard Snow. B. R.

Declaration in debt on a recognizance against bail, must set out for whom defendant was bail, and in what sum.

DEBT upon a recognizance of bail; defendant demurs, and assigns for cause that it does not appear by the declaration whose suit the defendant became bail for *Snow*, nor in what sum of money.

To this it was answered, that the entries of recognizances are not in any particular sum. *Lillie's Ent.* 521. *6 Mod.* 159. *Sed per curiam*, *6 Mod.* is very different from this; for there never was a declaration like this; it ought to have set out that the defendant became bail for such a person in a certain plea of debt of so much money, for which the plaintiff exhibited his bill, &c. Judgment for the defendant, unless cause before the end of the term.

Blinkhorn *versus* Feaft. In Chancery, 24 Oct. 1750.

A Man makes his will, and appoints two infants his joint executors, and gives to each of them a separate specific legacy of his personal estate, *viz.* To each of them a particular mortgage, and makes no disposition of the *residuum*; and the question now upon the hearing of the cause is, whether there should be a resulting trust as to the residue for the benefit of the testator's next of kin, or whether it should go to the executors.

When there are two executors and unequal legacies are given them, or a legacy to one and nothing to the other, they shall have the *residuum* undisposed of.

Lord Chancellor decreed that it must in this case go to the executors, and not to the *next of kin*; for the testator by giving them specific legacies of unequal value intended so much to prefer *one* before the *other*; and *2dly*, The testator might intend that they should take some part of his estate in severalty as tenants in common, and the residue as jointenants, which in this case they do. And the Lord Chancellor cited a case before himself, where there were two executors, and a legacy given to *one*, but nothing to the *other*, and the residue being undisposed of, he decreed it to the executors jointly and equally; and said the testator, in that case, only intended to prefer *one* executor to the *other*, to the amount of the legacy he had given to that *one*.

Hilary Term

24 Geo. 2. 1750.

The Right Honourable the Earl of Chesterfield and others, Executors of the Honourable John Spencer, Esq; *versus* Sir Abraham Jansen, Knt. In Chancery, before Lord Hardwicke, assisted by Lord Chief Justice Lee, his Honour the Master of the Rolls, Sir John Strange, Lord Chief Justice Willes, and Mr. Justice Burnett.

Fraud, imposition, and catching bargain, what shall, or shall not be deemed such.

Usurious contract, what constitutes it.

IN May 1738. Mr. *Spencer* was 30 years of age, had an estate of 7000*l.* *per ann.* of his own, and another large estate whereof he was tenant for life, and having contracted debts was very much pressed for money to pay them off; the *Dutchess of Marlborough*, from whom Mr. *Spencer* had very great expectations, was then 78 years of age; Mr. *Spencer* by his agent sent a proposal to market to borrow 5000*l.* to pay 10000*l.* for it within a month after the death of the *Dutchess*, in case he should survive her; the defendant listened to the proposal, but at first hesitated; however, at last, came into the bargain, and advanced to Mr. *Spencer* 5000*l.* who gave a bond to pay the defendant 10000*l.* if Mr. *Spencer* should survive the *Dutchess*, which bond was made by Mr. *Spencer*'s own agent.

The *Dutchess* died in October 1744. about six years and five months after this bargain, whereupon Mr. *Spencer* sent for the defendant and expressed himself sorry that he could not then immediately pay him the 10000*l.* and of his own free accord offered to give, and actually did give the defendant a bond in the penalty of 20000*l.* and a warrant of attorney to confess a judgment for the 10000*l.* and interest, and thereupon the defendant gave him up his first bond; Mr. *Spencer* afterwards paid 2000*l.* in part, and died in June 1746. about one year and eight months after the *Dutchess*.

The defendant having sued out a *scire facias* upon the judgment against the plaintiffs, this bill is brought to set aside the contract as
I
usurious

usurious and illegal, or against conscience; and for an injunction, upon payment to the defendant of what remains due to him of his 5000*l.* and interest.

The defendant in his answer admits all the facts above, and further says, that in his conscience he thinks the bargain was a fair one, for that Mr. *Spencer* was very infirm in his constitution; and in truth did not long survive the *Dutchess*, so that the defendant ran a great hazard of losing the whole 5000*l.*

It appears from the proofs read in the cause for the plaintiff, that it was hawked about, that Mr. *Spencer* wanted to borrow 5000*l.* to pay double for it upon the death of the *Dutchess* if he survived her, and *Backwell* (a gamester) the witness told Mr. *Spencer* that he had found out a man of honour and fortune proper to be applied to, who, if he should not be willing to come into the bargain, would keep the matter secret, so that there would be no danger of its coming to the ears of the *Dutchess*; upon this, *Backwell* applied to the defendant on behalf of Mr. *Spencer*, who, he swears, at first, declined the bargain, but said, he would consider of it; afterwards he agreed to it, and advanced the money upon the terms above; it is also proved for plaintiff that Mr. *Spencer* was of a very strong constitution in 1738.

From the proofs read for the defendant it appears, that Lord *Mumford* refused to advance the money upon the like terms proposed to him, because he looked upon Mr. *Spencer*'s life to be a bad one; several witnesses prove him of a broken constitution, and the *Dutchess* of a strong one for a person of her years; it is also proved that in 1738. Mr. *Spencer* was indebted to several persons to the amount of 20000*l.* was much pressed for money, and that after he had got the 5000*l.* of the defendant he applied the money to pay off tradesmen.

This case was solemnly debated in *Trinity* term last by Mr. *Noel*, Mr. *Clarke*, Mr. *Wilbrabam* and Mr. *Crowle* for the plaintiffs, and by Mr. *Attorney* and Mr. *Solicitor General* for the defendant.

It was argued for the plaintiffs, 1st, That this was an usurious contract, and could not have stood, even at law.

2^{dly}, That if it was not strictly an usurious contract, yet under the circumstances of the case, it is a bargain against conscience, and ought to be set aside in a court of equity, as being an unreasonable advantage made of a necessitous man.

And

And 3dly, That what Mr. *Spencer* did after the death of the *Dutchess*, shall not make that bargain good, which in conscience ought not to stand, as being inconsistent with the policy of the kingdom.

Mr. Attorney
General
Rider.

In answer to the first point it was insisted for the defendant, that to make a contract usurious there must be a loan of money to be repaid in all events with more than lawful interest, that the 5000*l.* was not to be repaid in all events, but only in case Mr. *Spencer* should survive the *Dutchess*; so that the defendant ran the hazard of losing the whole. *Cro. Eliz.* 741. *Cro. Jac.* 209. And the true reason why a *bottomree bond* is not within the statute of usury, is not upon account of trade, but because the party runs a risque of losing all.

2dly, It was argued for the defendant, that as this was not an usurious contract, so neither was it a bargain against conscience fit for this court to interpose in; that the manner of obtaining the contract was very fair on the part of the defendant, who never has made it his business to deal in this manner before; that Mr. *Spencer* sought *him* to come into the contract, and not *he* Mr. *Spencer*, who was wholly a stranger to him, and *this* the defendant swears, and it is also proved, that it is not so much as charged or hinted at, that Mr. *Spencer* was a weak young man, or in the least liable to be imposed upon, and though he might have run out a little; yet he had an estate in possession of above 7000*l. per ann.* and that he paid his tradesmen with the 5000*l.* was a circumstance in the defendant's favour.

And 3dly, It was insisted upon for the defendant by Mr. *Attorney*, that supposing this was originally a bad contract (which he absolutely denied) yet Mr. *Spencer* by giving his bond and judgment after the death of the *Dutchess*, and paying 2000*l.* in part, freely and voluntarily has made the bargain good, and shews most clearly that Mr. *Spencer* looked upon the contract as very fair; and that there was not the least fraud, circumvention, or imposition in it.

Mr. Solicitor argued next for the defendant, and (in the judgment of all who heard that great man,) made one of the most learned and elegant arguments that ever was heard in the hall. I am conscious to myself it is impossible for me to do the great orator justice, unless I could write down every word he spoke, and therefore I must tell the reader that what I here report is no more than a rough sketch of the heads or substance of his argument.

Mr. Murray.

Mr. *Solicitor General*: Three questions are made; 1st, Whether the bond as it stood originally was not void at law by the statute of usury?

2d, Whether this court cannot set the bargain aside, as being against conscience.

And 3dly, If the bond be neither against law nor against conscience, yet whether this court ought not to set it aside on the foot of policy.

I shall first premise that this is as fair, as honest, and as honourable a contract as can be made, and will be most plainly shewn to be so, by considering,

1st, The circumstances, character and situation in life of the obligor; and

2dly, Of the obligee.

3dly, The manner in which the contract was carried on and concluded.

4thly, The fairness of the price.

5thly, The opinion the obligor himself had of this transaction.

1st, The *circumstances, character and situation in life of the obligor*: he was 30 years of age, of good understanding, not liable to be imposed upon, not a young heir, had no father, was himself a father, was in no state of disobedience with any relation, never gamed to excess, or lost at gaming 300*l.* in all his life, his fortune in lands was 5000*l.* *per ann.* settled upon his marriage, he had 2000*l.* *per ann.* and the interest of 10000*l.* under the *Duke of Marlborough's* will, a leasehold of 120*l.* *per ann.* 7520*l.* *per ann.* for his life, besides plate and furniture agreeable to his fortune, and had great expectations from the *Dutchess of Marlborough*, whose favourite he was; when he wanted and had this 5000*l.* he owed to tradesmen 20000*l.* Justice required him to pay his debts, nay prudence required it, for fear their clamors should reach the ears of the *Dutchess*; and if he had advised with his best friends how to raise money, they must have told him this was the best way of doing it; suppose at the time of making this contract it had been settled and known that such a contract was bad, and that this court would have set it aside, Mr. *Spencer* must have been ruined.

2dly, The *circumstances and character of the defendant*; He is a man of fortune, upon whose character there is not the least charge or imputation in the bill; this is the only bargain of the kind he ever made; it might have been material for the plaintiffs to have made it appear that this was his usual way of traffic; he was quite

a stranger to Mr. *Spencer*, nor ever kept him company, and shall the property of a fair and honest man be taken from him, because there are such persons in the world as devourers of young heirs?

3dly, *The manner in which the bargain was carried on and concluded*, was extremely fair; Mr. *Spencer* himself sent the proposal to the defendant, and fixed his own terms, which the defendant at first refused, as thinking them disadvantageous to him, for both the *Dutchess* and Mr. *Spencer* might have lived so long, that although she had died first, the defendant might really have lost by the bargain.

4thly, *The fairness of the price*. The bargain supposes the *Dutchess* must die first, or it would be a most foolish one indeed on the side of the defendant; and in truth some of the witnesses seem to think he made a foolish bargain; Mr. *Spencer* was certainly in a bad state of health, and only survived the *Dutchess* about 20 months, he died of a broken constitution, she of old age, compute the price on the event; they say on the other side the defendant might have insured Mr. *Spencer's* life for 5*l.* per cent. but this is only said by one witness, and that is of a life of 30 in perfect health; an exact computation has been made, that if the 5000*l.* had been put out at legal interest, and the interest made principal every six months, it would, in the time from the advancing thereof to Mr. *Spencer*, till the death of the *Dutchess*, have accumulated to 9663*l.* There must be some inequality in every bargain, and to make a bargain void by the *Roman* law, the price must not be half the value of the thing sold.

5thly, *The opinion Mr. Spencer himself had of this transaction* is, that it was a fair and honest bargain, he takes every proper step of his own accord to carry it into execution upon the death of the *Dutchess*; he writes to Mr. *Jansen* to desire him to prepare a bond and judgment, executes them, pays 1000*l.* at one time and 1000*l.* at another, and there is not the least suggestion or proof that the defendant ever threatened to distress Mr. *Spencer*.

So that this bargain, considered in every view, appears to be a fair and honest bargain; having premised thus much, I shall now consider the 1st question, namely,

Whether the bond as it stood originally was void at law by the statute of usury.

Antiently it was against the canon law to take any premium whatever for the loan of money, as being against the law of God, and our common law followed it. Usury is the hire of money for a certain price

price to be repaid again in all events, and if the price given for the hire exceeds what the statute allows, the security is void; the present case is a bargain upon a hazard, not a loan of money to be repaid in all events, and is no more within the *statute of usury*, than a variety of other contingent and hazardous bargains, as *bottomree bonds*, *discounting notes* and *bills of exchange*, *buying up securities at under value*, *wager at odds*, *insurance interest or no interest*, and many others; but if in truth the real substance of a contract be for a sum of money lent to be repaid with higher interest than the statute allows, no shift can take it out of the statute, no contrivance can keep it from being *usurious*; as therefore this was not a loan of money to be repaid at all events, it is impossible it can be a *usurious contract*.

As to the 2d question, *Whether this is not a bargain against conscience*; there is not the least charge or proof that the defendant has been guilty of any misbehaviour, fraud or imposition whatever, but then it is said,

3dly, That although this bargain may be good both in law and conscience, yet this court ought to set it aside on the foot of *politics*. To this I answer, that this court never exercises any *legislative authority*; if a contract be good both in law and conscience, this court cannot set it aside; what were all the hazardous stock jobbings in *Change Alley*? there was a statute made to prevent them, there was a statute in *Q. Ann's* time to prevent laying wagers on *politics*; *bets at dice*, or other *fair gaming*, could not be set aside but by the *legislature*; shares of *prizes* might have been sold by sailors before the late statute to prevent it. *If the courts in Westminster-hall should take upon them to exercise a legislative power, the property of mankind would be most precarious and uncertain, which is the greatest misery that can befall any country; set me a mark upon property that I may know when I do wrong.* It is good policy not to suffer trustees to purchase of their wards, their situation implies a presumption of imposition; in cases of bonds to lewd and common women, *presumption* is against them, but *that* may be taken off if there be proof the woman was only a prostitute to the man who gave the bond, and the court would confirm such bond. In cases of marriage-brocage bonds, private agreements between a father and son before the son's marriage, giving securities to pay money for procuring of offices, it is the *misbehaviour* of the party that makes the contracts void, but if the king gives a man leave to sell an office, the *misbehaviour* is taken off; so an attorney's taking a gratuity more than his just fees, pending the cause, is a *misbehaviour*, but not *so*, after the cause is ended. It is very dangerous to lay down general rules, (which are too often to be met with in the books,) when it is impossible the court, when they made such a decree, could ever intend to lay down such general rules. The case of *Atkins v. Fare*, was a bond given

given by a *filiifamilias* that she would marry, &c. the court set that aside upon the foot of *fraud* and *imposition*; but bargains with *filiifamilias* are not in every case void or to be condemned, they may buy books, pay debts for meat and drink, &c. This court has never said that every *post obit* bond is void. In every bargain there must be a prospect of *gain* on one side; *gain* is the great spur to industry; the reasoning in *Batty v. Lloyd* has never been contradicted, where my Lord Keeper says, "One that is necessitous must sell cheaper than those who are not so; if I had a mind to buy of a rich man a piece of ground that lay near mine for my convenience, he would ask me almost twice the value, so where people are constrained to sell, they must not look for the fullest price, &c."

It is impossible to prevent mankind from living above their income; and if it could be done, I cannot see what benefit it would be to the public; shall property be locked up and for ever intailed on the same families? if it could be done there would be an end of trade and industry; in short, men in necessity will have money if it can be attained by any means, and if they cannot get it of honest men they will run to knaves and sharpers, who will run any risk to conclude; as this bargain is neither against the statute of usury nor against conscience, I can see no foundation for setting it aside, or relieving against the bond and judgment.

The Lord Chancellor and the Lords the Judges took time till this term to consider, when they gave judgment *seriatim*.

Burnett Justice: I am of opinion that this is not an *usurious contract*. The old notion of *usury* is now at an end, and it is now well known that usury within the statute is taking a higher interest for the loan of money to be repaid in all events than the statute allows; this case is a contract upon a *hazard* that the defendant may never have any principal or interest at all, and is like the case of a *bottomry* bond; one of the first cases whereof is in *Cro. Jac.* 209, wherein the court determined it not to be within the statute of usury, because of the real *hazard* there was of losing the whole money.

1 Brownl. 108.
3 Keb. 304.
Cro. Eliz. 27.
Noy 151.
2 Lev. 7.
4 Leon. 208.
5 Rep. 69, 70.
2 And. 15.
Moor 397, 8.
Carth. 67.
1 Sid. 27.
Comb. 125.
1 Show. 8.
Cro. Eliz.
741, 642.
Cro. Jac. 507.
1 Lutw. 470.

But it was objected that *bottomry* bonds were held to be good in favour of trade; I answer that the true reason why the court holds them good is, because they are not against the statute, for how can a man be said to take a greater sum for the forbearance of payment of a sum of money, when by a *hazard* he runs, he may be intitled to neither *principal* nor *interest*; indeed a colourable *bottomry* bond may be within the statute as much as any other, as appears by *Hardres* 418.

I give no opinion that this bargain is or is not against conscience, but think this court is not warranted by *precedents* to set it aside upon payment of 5000*l.* and interest. If this had been the case of a young heir it might have had another consideration; although it might be too hard in every case totally to prevent young heirs from borrowing of money, yet on the other hand, if this court was to permit advantage to be taken of their wants and necessities, it would be of the utmost ill consequence, it would be supplying them with means to pursue their debaucheries; avarice on one hand and craving appetite on the other are two of the worst things that can draw people together; the supplying young heirs with money for lucre is a growing evil which this court by degrees has rightly gone further and further to relieve against. In the case of *Hill and Nott*, Lord Nottingham relieved upon no other footing than that it was against conscience; Lord North reversed the decree, because there was no evidence of *fraud* or *imposition*; but Lord Jeffereys affirmed Lord Nottingham's decree.

2 Cha. Ca.
136, 137.
2 Vern. 14.
1 Wms 310.

Curwen v. Milner, June 19, 1731. before Lord King; one married the daughter of a rich old man, borrowed 500*l.* to pay 1000*l.* if he survived his father-in-law; Lord King relieved on paying the 500*l.* and interest; he said if it had been a new case he would not have relieved, but thought himself bound by precedents, and particularly by *Berny v. Pitt*, 2 Vern. 14.

The case now before us is not like any of the cases cited: The borrower is not a young heir, is under no parental government, is in very rich circumstances, the terms of the bargain are of his own proposing, and the event shews the great *hazard* the defendant ran to lose all: if this court should lay it down as a general rule, that in no case whatever a young heir shall borrow money, a young heir who has a cruel and avaritious father, might starve in a *desart* with the land of *Canaan* in his view, but contracts with them must be honest and fair, not against *conscience*, or founded in *fraud* or *imposition*; but there is no occasion to give any opinion upon this second point.

Because Mr. *Spencer* has confirmed the bargain after the death of the Dutches, in the most free and voluntary manner, when he could be under no fear or constraint whatever, and is like *Cole v. Gibbons*, 3 Will. 290.

The Master of the *Rolls*: As to the first question, I concur with the learned and Reverend Judge who has already given his opinion, that this is not an usurious contract; two things must be, to make a usurious contract, the payment of money at a day on all events, and a taking of more than lawful interest; here was no certain time

N. Usury
cannot be
pleaded at
law to a sci.
fa. on a judg-
ment as this is.
2 Stra. 1043.

of payment, but the whole was at *hazard*; but if in truth this had really been a borrowing of the 5000*l.* to be repaid with an unlawful interest at a certain day, and had only been put in this shape to avoid the statute, this court, or a jury, would have made it void.

2d, Admitting the bond good at law, whether the plaintiffs are not relievable upon the nature of the contract; I offer nothing upon this head by way of judgment, but think it proper to declare that I heartily concur with those determinations which have been in this court in cases of young heirs, and do not mean to lessen the force of any of them; but here the defendant does not appear to be guilty of the least fraud, the bargain was proposed by Mr. *Spencer*, was at first refused, and had been so, by others; I declare I have not the least jealousy or suspicion of any thing unfair on the defendant's part; but I give no opinion upon this 2d point;

Because 3dly, Mr. *Spencer* has himself by his own subsequent acts, after the death of the *Dutchess*, most freely and voluntarily, without the least pressing or ungenteel behaviour on the defendant's part, declared that the bargain was fair and honest, and this most deliberately, for the 2d bond and judgment were not executed till two months after the death of the *Dutchess*.

Post obits are not to be favoured, but this is a very particular case; I am far from blaming the plaintiffs for submitting the case to this court, being trustees for an infant.

I am of opinion the plaintiffs are not intitled to be relieved but upon paying of what remains due of the 10000*l.* and interest.

Lee Chief Justice: I concur with his Honour and my brother *Burnett* as to the first point, that this is not an usurious contract for the reasons they have given.

As to the 2d point, I think it is well worth the while of courts of equity to consider whether they will not interpose in these bargains of *hazard*, and paying two for one; this court has always used the utmost sagacity, to discover fraud and imposition upon young heirs, to prevent the trade of biting and cheating them. I speak thus generally because I think what Mr. *Spencer* himself has done, since the death of the *Dutchess*, has prevented the court from determining on this point.

Domat 136,
137, 138.

For supposing the original contract attended with such circumstances as might have induced the court to interpose, yet what Mr. *Spencer* has since done, has made it good; and the case in 3 *Wms* 290, seems to me to be a stronger case than this.

Lord Chancellor *Hardwicke*: If I could have foreseen the point upon which the judgment of the court turns, I would have saved the learned Judges the trouble of giving me their assistance.

The first point is a mere question of law, and is just the same as if the whole matter had been disclosed by special pleading at law; if I had differed with the Judges in this point, yet as it is a legal question, I should have thought myself bound by their opinion, being a matter within their province, but I have no doubt at all, and concur with them, that this is not an *usurious contract*, but a wager of *bazard* not within the statute; to make a contract *usurious* there must be a *loan* to be repaid at all events with higher interest than the *statute* permits.

Bottomry bonds are held good, not because they are for the benefit of trade, but because the *whole* is at *bazard*; if the contingency goes only to the *interest* and not to the *principal* it's *usury*. Courts regard the *substance* and not the *mere words* of contracts; *loans* on a fair contingency to risk the *whole* money are not within the *statute*; a man may purchase an *annuity* as low as possible, but if the treaty be about *borrowing* and *lending*, and the *annuity* only *colourable*, the contract may be *usurious* however disguised.

As to the 2d point, Whether the plaintiffs are to be relieved upon any head of equity?

This court has undoubted jurisdiction to relieve in every case of fraud; if a bargain be *such* as no man in his senses would make, or as no honest man would come into, *there* the fraud would be apparent, and of such bargains the law courts have said they are unjust, as in 1 *Lev.* 111. *Jones v. Morgan*, in an *assumpsit* to pay for a horse one barley corn *per* nail, and double every nail, and avers that there were 32 nails in the shoes of the horse, which doubling every nail came to 500 quarters of barley; and at the trial before *Hide* at *Hereford* he directed the jury to give no more than the real value of the horse in damages, being 8*l.* and they did so, very rightly.

Knowingly or *advisedly* to take advantage of a man's *necessity* is equally bad as to take advantage of his *weakness* or *ignorance*. It may seem a little odd that a third person, no party to the contract, should be relieved; yet in cases of *marriage-brocage* bonds the court relieves, though neither of the persons are parties to the contract. So where one compounds with his creditors provided they all execute a deed in such a time, and to induce one to come in, he privately secures to him a larger composition; the others may be relieved against such underhand bargain. So in recommending persons to places and offices. All contracts must be *bonâ fide*, there must be

no *malus dolus*, contracts with young heirs and reversioners are generally compounded of the topics of fraud presumed or implied, from weakness and necessity on one side, avarice and imposition on the other; in the present case there is no fraud either implied or apparent in the defendant; and I really believe Sir *Abraham Jansen* thought he was doing a fair thing when he made the bargain.

But it is insisted, here was *necessity* (as hawking about) on one hand, and avarice of two. for one on the other, and a deceit upon the *Dutchess* who was in *loco parentis*. To this it may be answered that there are circumstances in the case very strong to take off this objection; if it was necessary to give any opinion upon this point, I should be more particular.

I would not have it by any means understood, that if this was the case of a person, whose whole dependance was upon a father or relation, that such a bargain as this could stand; the *Roman senate* restrained the son from running in debt by the *Senatus Consultum Macedonian*.

It has been said at the bar that *this*, would be for this court to assume a *legislative authority*; I disclaim any such power, but yet shall never be afraid of following the determinations of my predecessors.

I have said thus much, that it may not be rumoured about that by what we have done to day we have shaken former decrees touching young heirs, reversioners, &c.

Upon the 3d point the judgment of the court depends; and I am of opinion that in case of a bargain subject to equitable objections, a person by a future agreement made freely, upon sufficient information, without compulsion, and under no circumstances of distress or necessity, may bar himself of all equitable objections against the original bargain; in the present case when the *Dutchess* was dead, Mr. *Spencer*'s necessity was at an end, little more than a third of his yearly income would then pay off the 10000*l.* he, of his own free will, sends for the defendant, gives him a fresh security, pays part, and is sorry he cannot pay the whole; he was under no restraint, no fear from any relation; this is a stronger case than *Cole* and *Gibbons*. Plaintiffs must be relieved only against the penalty upon paying what remains due to the defendant of the 10000*l.* and interest, but the defendant must have no costs, this being a case not to be favoured.

Lord Chief Justice *Willes* is indisposed, but has written me a letter, wherein he acquaints me that he is of the same opinion with the court upon all the points.

Hilary

Hilary Term

24 Geo. 2. 1750.

Peirce *versus* — B. R.

THIS cause was tried in *Hilary vacation*, and a verdict for the plaintiff; the defendant rendered himself in discharge of his bail the 2d day of *April*, the plaintiff might have signed final judgment in *Easter* term after the trial, but did not sign it until *Trinity term*, and afterwards in *Michaelmas term* charged the defendant in execution; and now it was moved that the defendant might have a *superfedeas* to discharge him out of prison, because the plaintiff (as was alledged), ought to have proceeded to final judgment in *Easter* term next after the trial, and to have charged the defendant in execution in *Trinity* term following. *Sed per curiam*, There is no colour for granting the motion, for the defendant did not render himself till after the trial, and though the plaintiff might have signed final judgment in *Easter* term, yet he might have good reason for not doing it; but however that be, the rule of court does not oblige him to proceed to the final judgment the next term after the trial, and therefore we will not grant a *superfedeas*.

Verdict for plaintiff in Hilary vacation, defendant renders himself 2 April, final judgment in Trinity term, defendant charged in execution in Michaelmas term, this is regular, and defendant is not intitled to a *superfedeas*. Rule 2 Geo.

Herbert *versus* Ashburner. B. R.

RULE to shew cause why the defendant should not have liberty to inspect the books of the sessions of the corporation of *Kendale*; it was objected that the party is not intitled to see the books unless he can shew to the court by affidavit that they contain matters relating to the thing in question, which is, whether the *park lands* be within the town or corporation of *Kendale*. *Sed per curiam*, These are public books which every body has a right to see; and the rule was made absolute without hearing the other side.

Every body has a right to inspect books of the sessions.

Wheeler an Attorney's Case. B. R.

Privilege of
an attorney.

HE was arrested by a *latitat*; and it was held *per totam curiam*, That it is a motion of course to discharge him out of custody on filing *common bail*.

Easter Term

24 Geo. 2. 1751.

Mayor and Commonalty of Bristol *versus* Procter. B. R.

Venue changed to the next county for want of a fair trial in the proper county.

Salk. 670.

MR. Norton moved on behalf of the defendant to change the venue from the city of *Bristol* into the county of *Somerset*, alledging that the sheriff and coroners of *Bristol* are chosen by the city, and therefore there could not be a fair trial; *Per curiam*, This is not a motion of course, there must be an *affidavit* laid before us that the sheriff of *Bristol* is an officer of the corporation, afterwards such an *affidavit* was produced and a rule was made to shew cause; Mr. *Probyn* shewed for cause that the matter in question did not concern the corporation; but by consent the venue was changed into the county of *Gloucester*.

Rex *versus* The Parish of Silverton. B. R.

No new trial where the defendant is acquitted on an indictment for not repairing the highway.

INDICTMENT for not repairing the highway, and a verdict for the parish. It was now moved for a new trial (by Mr. *Pratt*,) for misdirection, or over-ruling evidence at the trial, by reason whereof the parish were unduly acquitted; *Per curiam*, This is a criminal case, and new trials are never allowed where defendant is acquitted in a criminal case. So also it is in *qui tam's* and informations in nature of *quo warranto's*.

The Honourable Alexander Murray's Case. B. R.

AN *habeas corpus* directed to the keeper of *Newgate* to bring up the body of *Alexander Murray*, Esq; whereupon it was returned and certified to the court that the prisoner by an order of the house of Commons of the 7th of February was committed to *Newgate* for an *high contempt* of that house, and he was not to be permitted to have pen, ink or paper, nor should any body be permitted to see him without order of the house; that the *keeper* was afterward served with several orders of the house to permit the Doctor and Apothecary and some relations to see him, and being now brought to the bar, and appearing to be in a very bad state of health from his imprisonment, Sir *John Phillips* Baronet, a member of the house (who seldom came to the bar) moved that he might be admitted to bail upon the *habeas corpus act*, 31 car. 2. cap. 2. alledging that this statute was one of the great bulwarks of *English* liberty, and if the commitment be not for treason or felony, or by legal process issuing out of some court *here*, he is intitled to be discharged out of custody upon *bail*: He said it is well known that the house of Commons cannot take *bail*, and if this court will not admit the prisoner to *bail*, it will be in the power of the house of Commons perpetually to imprison; the *habeas corpus act* is of higher authority than an order of the Commons, who are but one branch of the legislature, and however their orders may bind themselves, yet nothing less than an act of parliament shall bind the whole body of the people and nation. Liberty is the birthright of every subject, and he has a right to apply *here* for it.

One committed for a contempt of the house of Commons cannot be bailed by the King's Bench.

Wright Justice: It appears upon the return of this *habeas corpus* that Mr. *Murray* is committed to *Newgate* by the house of Commons "for an high and dangerous contempt of the privileges of that house"; and it is now insisted upon, at the bar, that this is a *bailable case* within the meaning of the *habeas corpus act*.

To this I answer, that it has been determined by all the Judges to the contrary; that it could never be the intent of that statute to give a Judge at his chamber, or this court, power to judge of the privileges of the house of Commons.

The house of Commons is undoubtedly an high court, and it is agreed on all hands that they have power to judge of their own privileges; it need not appear to us what the contempt was, for if it did appear, we could not judge thereof.

Lord

Lord *Shaftesbury* was committed for a contempt of the house, and being brought here by an *habeas corpus*, the court remanded him. And no case has been cited wherever this court interposed.

The house of Commons is superior to this court in this particular; this court cannot admit to bail a person committed for a contempt in any other court in *Westminster-hall*.

Denison Justice: This court has no jurisdiction in the present case; we granted the *habeas corpus*, not knowing what the commitment was, but now it appears to be for a contempt of the privileges of the house of Commons; what those privileges (of either house) are we do not know, nor need they tell us *what* the contempt was, because we cannot judge of it; for I must call this court inferior to the house of Commons with respect to judging of their privileges and contempts against them; I give my judgment so suddenly because I think it a clear case, and requires no time for consideration.

Foster Justice: The law of parliament, is part of the law of the land, and there would be an end of all law if the house of Commons could not commit for a contempt; all courts of record (even the lowest) may commit for a contempt. And Lord *Holt*, though he differed with the other judges, yet agreed the house might commit for a contempt in the face of the house. As for the prisoner's illness we can take no notice of it, having no power at all in this case.

The prisoner was remanded. *Lee* C. Justice absent.

Gardener *versus* Davis. B. R.

In prohibition the issue laid upon the plaintiff, who did not appear at the trial, the defendant puts in his record, enters into the merits and takes a verdict, this is irregular, for the plaintiff ought to have been called and nonsuited.

IN prohibition, the parties were at issue, which was, whether a certain piece of land was parcel of the plaintiff's tenement; the proof of the affirmative laid upon the plaintiff; when the cause came on to be tried, the plaintiff (having countermanded notice of trial) did not appear, whereupon the defendant entred into his proofs, and the cause was tried upon the defendant's record of *nisi prius*, and a verdict was found for the defendant, and judgment has been entred thereupon. It was moved for the plaintiff that this was irregular, for that the plaintiff not appearing ought to have been called and nonsuited.

Upon shewing cause it was said for the defendant that both the parties in prohibition are *actors*, that both carried down the record and gave notice of trial, and that although plaintiff countermanded his notice, yet the defendant had a right to try the cause upon his record and

and if the plaintiff knew he could not be ready, he ought to have moved the court to put off the trial, and the defendant being *actor* had a right to go into the merits, and to take a verdict.

For the plaintiff it was insisted, and resolved by the court, that although the defendant in *prohibition* is an *actor*, yet in this case where the issue laid upon the plaintiff and he was to begin first, he ought to have been *called and nonsuited* if he did not appear, and therefore the proceeding to take a *verdict* is irregular, and must be set aside. Indeed if the issue had laid upon the defendant, and he had been obliged to begin first, it might have had another consideration, but as to that they gave no opinion; the verdict was set aside as irregular, but without costs, this being a new case.

Same *versus* The Same. B. R.

THE verdict being set aside as above, it was moved that the defendant might be at liberty to enter a *nonsuit* upon an *affidavit* that the plaintiff did not appear at the trial. But *per curiam*, A nonsuit cannot be *now* recorded *here*, it ought to have been recorded by the Judge of *Nisi prius*. A nonsuit at Nisi prius cannot be recorded in Bank.

Rex *versus* Combrune. B. R.

INDICTMENT, charges that the defendant did fraudulently and deceitfully deliver to *Susan Farmer*, wife of *James Farmer*, 274 gallons and three quarts of strong beer, when he ought to have delivered 288 gallons, as was agreed and paid for, (the sum of 9*l*.) Indictment for a deceit of a private nature quashed.

It was moved to quash this indictment, that this was a fraud of a private nature, for which an *action* upon the *case* for a *deceit* was the proper remedy, and here is no charge that the defendant sold by *false measure*.

Per curiam, This is a mere action of *deceit*, and the *indictment* must be quashed.

Earl *versus* Brown. B. R.

Plaintiff dies
after a verdict
and before the
day in Bank,
though the
judgment be
right yet a
scire facias
must be a-
warded before
execution.

THE plaintiff died after the *verdict* and before *judgment* was entered thereupon. Afterwards *judgment* was entered and an execution taken out, without any *scire facias* sued out at the suit of the plaintiff's representative. And now it was moved to set aside the execution of *feri facias*; and it was held that although the judgment was regularly entered by the 17 Car. 2. c. 8. yet the *feri facias* issued irregularly, for there ought to have been a *scire facias*; so the *feri facias* was set aside, and the money levied thereupon ordered to be restored to the defendant, *per totam curiam*.

Anonymous. B. R.

After a plea
in abatement
and demurrer
the plaintiff
must pray a
respondeas
ouster, and
not judgment
in chief.
Carth. 137.

THE defendant pleads in *abatement* that there is no such person as the plaintiff in *rerum natura*, the plaintiff replies that there is, *viz.* at *Westminster*, defendant demurs, plaintiff joins in demurrer and prays judgment and his damages, which being in chief is wrong, for it ought to be that he *may answer over*. *Per curiam*, Let it stand over with leave to the plaintiff to move to amend on payment of costs.

Trinity Term

24 & 25 Geo. 2. 1751.

Rex *versus* Ponsonby & al^r. In Error.

INFORMATION in nature of a *quo warranto* in the King's Bench in Ireland, to shew by what authority the defendants claim to be burgeses of a certain borough. The information, pleas, replications, rejoinders, demurrers, and joinders in demurrer, all appear to be of *Trinity* term in the 21 & 22 Geo. 2. after the joinders in demurrer there appears to be an entry of a *continuance* by *curia advisare vult* and day given by the court in *Easter* term following, skipping over two terms, viz. *Michaelmas* and *Hilary* terms 22 Geo. 2. and then judgment is entred for the King of *Easter* term 22 Geo. 2. a writ of *error* is brought and the record being transcribed and sent hither, it was moved to amend the record *here* by inserting two *continuances* which are omitted, and it was urged for the King, 1st, That if this was a *misprision* of the clerk or of the court, that it is amendable by this court, and 2^{dly}, That it was a *miscontinuance* and not a *discontinuance*, and in either case amendable at common law.

Amendment by adding continuances cannot be made in a record transcribed without some record to amend by, but the court will grant a certiorari to send for the continuances.

For the defendants it was said, that the record being made up and transcribed hither, the court must look upon it as the act of the court and not the *misprision* of the clerk, and that this is a *discontinuance* of the suit; and the case of *Friend v. Baker*, *Styl.* 339. was relied upon.

Lee Chief Justice: This is an application to the court to make a *continuance* upon a record removed *here*; I agree that *discontinuances* or *miscontinuances* before judgment are the acts of the clerk, but after judgment is entred and the record closed and made up, *discontinuances* are the acts of the court. *Comyns* 419. And we have nothing to amend by. I also agree that the *superior court* where *error* is brought may make such *amendments* as the court below may, but *that* can only be done when the *superior court* has the same matter to amend by, as the *inferior* has. In the case of

Winkworth

Trin. 4 Geo. 1. *Winkworth v. Clark*, which was *error in debt* from the C. B. upon a judgment by default; the *placita* was of *Hilary* term, the want of an original was assigned for *error*, and *in nullo est erratum* was pleaded, which closed the record; diminution was alledged, and thereupon an *original* was returned hither returnable of the *Michaelmas* term preceding the *placita*, without any continuance to *Hilary* term; this court could not insert a *continuance*, but *ex debito justitie* sent a *certiorari* to the C. B. to inform the conscience of the court whether there was any *continuance*, and the C. B. sent up the *continuance*, and it was not once thought of, or insisted upon by those who argued this case that this court could make the *continuance*; this is a very strong case in point.

2 Stra. 735.

Wright Justice: I am of the same opinion; the court in *Winkworth v. Clarke* said the *certiorari* was grantable *ex debito justitie*, and there was no imagination that this court could add the *continuance*.

Denison Justice: This is a *discontinuance*, and is fatal upon a demurrer, and there is no statute of *Jeoffails* that will help it; for aught we know there may be a record in *Ireland* that will make it compleat, and therefore we can grant a *certiorari* to inform the conscience of the court before we give judgment; but I never heard that after a record is sent hither that this court could amend it without something to amend by; this is quite a new kind of application.

Foster Justice of the same opinion: And so the rule to shew cause why the *continuances* should not be inserted was discharged. Sir *Thomas Bootle*, Sir *Richard Lloyd*, Mr. *Hume Campbell*, and Mr. *Ford* for the King. Serjeant *Poole*, Mr. *Henley* and Mr. *Jodrell* for the defendants.

Thompson versus Marshall. B. R.

Plaintiff must
intitle his de-
claration a-
greeable to
truth.

PER curiam, the defendant has a right to call upon the plaintiff to intitle his declaration agreeable to the true time of delivering it to the defendant.

Rex *versus* Clapham, an overseer of the poor. B. R.

A *Mandamus* was granted to oblige the *old overseer* of the poor to deliver over the books of the poor's rates to the *new overseer*; Mandamus to the old overseer of the poor to deliver the parish books to the new overseer. for *per curiam*, They are public books, and ought to be delivered over by one overseer to another, that all the parishoners may have access to them, and the overseer and churchwarden for the time being ought to have the custody thereof.

Read, executor of Tuack, *versus* Nash. B. R.

TUACK the plaintiff's testator brought an action of assault and battery against one *Johnson*; the cause being at issue, the record entered and just coming on to be tried, the defendant *Nash* being then present in court, in consideration that *Tuack* would not proceed to trial, but would withdraw his record, undertook and promised to pay *Tuack* 50*l.* and the costs in that suit to be taxed till the time of withdrawing the record, in which taxation all such sums of money were to be allowed as *Tuack* had paid and was liable to pay to his attorney and witnesses who attended the trial; *Tuack* relying upon this promise did withdraw his record, and no further proceeding was had in that cause; *Tuack* being dead, *Read* his executor has brought his action upon this special promise and undertaking by *Nash*. Promise, whether within the statute of frauds and perjuries. A promise to pay damages by a third person in case the plaintiff will withdraw his record, is not within the statute of frauds.

The defendant has pleaded *non assumpsit*, and thereupon issue is joined to the country; 2*dly*, He has pleaded the statute of frauds and perjuries; that the plaintiff ought not to have his action against him, because he says there was a statute made in the 29th year of King *Charles* the second for prevention of frauds and perjuries, whereby it was enacted, that from and after the 24th day of *June* 1677. no action should be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action should be brought, or some memorandum or note thereof should be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised; and then says, that the plaintiff *Read* has brought this action to charge him the said defendant with the debt, default or miscarriage of the said *Johnson*, and that there never was any agreement in writing touching this promise, nor any memorandum thereof; and this he is ready to verify, &c.

To this plea the plaintiff has demurred, and the defendant has joined in demurrer.

This case was twice argued at the bar, and after time taken by the court to consider, the Chief Justice delivered the opinion of the court.

Ld. Raym.
1085.

Lee Chief Justice: The single question is, Whether this promise which is confessed by the demurrer not to have been in writing is within the statute of frauds and perjuries, that is to say, whether it be a promise for the debt, default or miscarriage of another person; and we are all of opinion that it is not, but that it is an original promise sufficient to found an *assumpsit* upon against *Nash*, and is a *lien* upon *Nash*, and upon him only. *Johnson* was not a debtor, the cause was not tried, he did not appear to be guilty of any default or miscarriage, there might have been a verdict for him if the cause had been tried for any thing we can tell; he never was liable to the particular debt, damages or costs. The true difference is between an *original* promise and a *collateral* promise, the *first* is out of the statute, the *latter* is not when it is to pay the debt of another which was already contracted. Judgment for the plaintiff.

Snee versus Humphreys an Attorney of the C. B. B. R.

An attorney of the C. B. arrested by a *latitat* must plead his writ of privilege, and proceedings against him not discharged on motion.

AN attorney of the Common Pleas was arrested by a *latitat*; Mr. *Henley* moved that the proceedings against him *here* might be set aside, alledging that he ought to have been sued in the Common Pleas by bill. But *per curiam*, You must sue out your writ of privilege, for if you are an attorney of the Common Pleas, and are *rectus in curia* there, you will have it of course, and may plead it here.

Dale versus Eyre and others.

Nolle prosequi may be entered as to a defendant who ought not to have been joined.

TROVER against a defendant-executor and other defendants not executors, for a conversion in the life-time of the defendant-executor's testator; *verdict* against the defendants not executors, and the defendant-executor found *Not guilty*.

It was objected in arrest of judgment, that *this* being a *tort* does not survive, and you cannot join the executor a defendant with the others.

To this it was answered, that if trover be brought against several persons, and one dies, the writ does not abate. 11 Rep. 45. suppose all

all the defendants had been found guilty, the plaintiff might have entered a *nolle prosequi* as to any of them.

Curia: What do you say to that? cannot the plaintiff enter a *nolle prosequi*? You come too soon, we cannot tell but the plaintiff may help it by the entry. Rule to shew cause why judgment should not be arrested discharged.

Michaelmas Term

25 Geo. 2. 1751.

Between the Parishes of Tetbury and Ilam. B. R.

RULE to shew cause why an order of two justices confirmed by the sessions to remove a *pauper* from Tetbury to Ilam should not be quashed. The order states, that Mr. Pope of Ilam hearing the *pauper* was a boy likely to be fit for his service, sent to his father to desire he might come upon liking, the boy came and continued upon liking eight weeks, and then it states that Mr. Pope hired him for a year to commence from the beginning of the eight weeks he had been on liking, and that the boy continued in Mr. Pope's service at Ilam a year and ten days from his first coming upon liking.

There must be a hiring either absolute or conditional for a year and a service for a year to gain a settlement.

Per curiam, This case differs from all the cases; a coming upon liking is not like a conditional hiring at the first; There must be a hiring for a year either absolute or conditional previous to the service for a year; the hiring here has a retrospect to past liking; and the court held the *pauper* gained no settlement at Ilam, and quashed the orders of the justices and sessions.

Parsons *versus* Freeman and others. In Chancery,
November 9.

What act shall
amount to a
revocation of
a will.

MRS. *Freeman* being intitled under Mr. *Sawyer's* will to an estate-tail in the lands in question after the death of Mrs. *Sawyer*, and also to an estate in fee in other lands, by articles in 1739. in consideration of a settlement to be made upon her by Mr. *Freeman*, covenants that the *lands in question* shall be conveyed to him in fee, and the other estate to him for life.

Mr. *Freeman* being thus intitled to an equitable estate under the articles, afterwards and before the same were carried into execution by legal conveyance makes his will, and *devises* the *lands in question* to some of the defendants.

After the making his will, he having the equitable, and his wife having the legal estate, join in a deed to make a tenant to the *præcipe* to levy a fine and suffer a recovery (which were both done) and declare the same shall enure to such uses as they two should by deed jointly direct, limit and appoint, and in default thereof to the use of Mr. *Freeman* the husband in fee. The wife lived sometime afterwards, the husband survived, and no joint deed of appointment was ever made by them.

The question in this case is, Whether the fine and recovery and deed to lead the uses thereof be a *revocation* of Mr. *Freeman's* will as to those lands whereof Mrs. *Freeman* was seised in tail, and wherein Mr. *Freeman* had an equitable title in fee at the time he devised the same.

It was argued for the plaintiff (Mr. *Freeman's* heir at law,) that this amounted to a revocation of the will; that it is a known principle if a man seised in fee makes his will, and after makes a feoffment or other conveyance in fee, and then takes back a new estate in fee, that *this* is a revocation of the will; for wherever a man puts the whole interest of the lands out of him by any conveyance whatever, though he take it back again the next day, it will amount to a *revocation*. Indeed in the case of a *mortgage* it is not a *total revocation*, but only *pro tanto*, for the *mortgagor* does not part with his whole interest, but he, his heir, or devisee, may redeem, 3 *Wm.* 163. 1 *Ro. Abr.* 616. *Earl of Lincoln* and *Rolls.* *Eq. Cas. Abr.* 411, 412. *Pollen and Husband, Ibid.*

Titner v. Titner, In ejectment about a year ago was a case reserved for the opinion of Lord Chief Justice *Lee*: *Robert Titner* died in 1741. seised in fee of the lands in question being *Gavelkind*, leaving two sons *Robert* and *Henry* (the plaintiff's lessor) who both entered upon their father's death, and were each seised of an undivided moiety, and being so seised *Robert* the son the 12th of Feb. 1742. by his will devised all his lands and tenements, and all his said moiety whereof his father was seised, to his wife the defendant *Eliz. Titner*; afterwards in 1745. a deed of partition was made and executed by and between *Robert* and *Henry*, and the premises in question were allotted to *Robert*, and it was covenanted therein that they and their wives should all join in levying a fine (which was done) and that the same, as to the lands in question, should enure to the use of *Robert Titner*, and such person and persons, and for such estate and estates, as he should, by deed or will, limit, direct or appoint, and in default of such appointment, to the use of *Robert Titner* in fee; Lord Chief Justice *Lee* clearly held this a *revocation* of the will, and not like the case of a bare partition only made by the sheriff (unattended with a fine or conveyance to the new use) which would not have been a *revocation*.

That where there is a deed of covenant to levy a *fine* to certain uses, and before the *fine* is levied all the same parties enter into a second deed, and declare that the *same fine* shall enure to different uses, in this case the *uses* of the *fine* shall be directed by the second deed. *Moor* 1107. 2 *And.* 46. for until the uses be executed, *that* is until the fine be actually levied and executed, the parties may vary the uses (if they all agree) as they please. *Jones v. Morley*, 2 *Salk.* 677. in *Carth.* and other books.

On the other side it was argued for the devisee, That this is not a *revocation* of the will as to the lands in question, that Mr. *Freeman* at the time of making his will had an equitable estate in fee therein, as much as if he had purchased the same with his own money in the name of another person; this equitable estate he devises by his will, and the recovery and fine, as to the lands in question, do no more than convey a legal estate to him, who before had an equitable estate in fee therein, and is no ways inconsistent with, nor shews any kind of intention in him to revoke his will as to this estate, and his conveying the legal fee to him is only a performance of part of the articles; the case of *Titner* and *Titner* wholly concerns a legal estate, and there was a new estate and new uses raised of *that* which was a legal estate at first, which were the grounds of that determination. The recovery in the present case created a fee in somebody, which (if no uses had been declared) would have been subject to such trusts as the tail before was subject to, and if the legal estate thereupon resulted to Mrs. *Freeman*, it must be in trust for her husband

husband under the articles, and in case of her death her heir would have been trustee for him.

It was admitted by the devisee's counsel that it is generally true where a man seised in fee devises, and after conveys in fee, and takes back an estate in fee by a new conveyance, that *this* amounts to a *revocation*; but they strongly insisted that the conversion of a *legal* estate into an *equitable* one, or an *equitable* estate into a *legal* one, does not amount to a *revocation*.

Lord Chancellor *Hardwicke*: Determinations in cases of *revocations* of wills have always been favourable to the heir at law. It is admitted on all hands that if the testator had had a legal fee, devised it, and afterwards suffered a recovery, it would have amounted to a revocation of his will; or if the recovery had been declared to be to such uses as he should direct, and for default thereof to the testator in fee, that this would also have amounted to a revocation; and it is as certain likewise that if a man seised in fee, devises, and afterwards conveys the same away by any legal conveyance whatever, and takes back again a new estate, this would be a revocation of the devise; but there are cases go further, for if one seised in fee devises, and after levies a fine to his own use in fee, this has always been held a revocation, though the testator is *in* of the *old use*; this is a prodigious strong case; the reason is, that courts of justice, in favour of the heir, will presume the testator had some intention to alter or revoke his will in favour of the heir, by such an act done after the will.

Indeed where the testator seised in fee, afterwards leases for years or lives, or mortgages, or conveys to pay debts, these are only *revocations pro tanto*, and shew particularly how far the testator intended to alter his will, by drawing the line exactly.

It is objected, that although what I have said of a *legal* estate be true, yet it is not so of an *equitable* estate; but I am of opinion that it is, for it would be an iniquitous thing to determine that it is not, for then a court of equity would decree contrary to law; and therefore if a man seised of an equitable estate devises it, and afterwards a new conveyance is made with his consent, and some new trust declared for him, this would be a revocation, but, as I said before, a mortgage, or a conveyance in trust for payment of debts would be only *revocations pro tanto*, for by *these*, a specific intention is shewn; so is 2 *Vern.* 295. and so is *Ogle and Cooke*, 20 Feb. 1748 where a real estate was devised, and afterwards the testator conveyed it in fee to be sold to pay money to Mr. *Cooke* and the surplus to be paid to the plaintiff, though the whole to be sold, yet I held it only a *revocation pro tanto*, and think the determination is right.

so that the devisee in these cases shall have a redemption, or the surplus after debts paid.

To come to the present case; I take it for granted on both sides, that Mr. *Freeman* when he made his will had an equitable estate in fee in the lands in question, and the like for life in the other lands, for he could have compelled a specific performance of the articles, and obliged his wife to make a legal conveyance agreeable thereto; he, having this interest, makes his will, which could only have operated to convey *those* in question to the devisee, for the other he had only for life: then a fine and recovery are had of *all* together, and the uses thereof declared as above; the wife lives some years afterwards, he survives, no appointment was ever made by them, he gains a legal fee hereby in *the whole*; this is certainly more than gaining to himself a legal estate in the lands wherein, before, he had only an equitable one, for he has, besides declaring the same to other uses, gained to himself a legal fee in *that* wherein he before had only an equitable estate for life. Indeed if a man has an equitable estate which he devises, and after takes by legal conveyance the legal estate therein, in that case I am of opinion it is no *revocation*, for this is the common case where a man contracts for the purchase of lands, and before any legal conveyance thereof made to him, he devises the same and dies, the devisee shall compel a specific performance, and shall have sufficient of the testator's personal estate to pay the purchase money; and though the *devise* be between the articles and the legal conveyance it is no *revocation*, for be it of what kind soever, it is only instrumental in changing an *equitable* into a *legal* estate, and makes no alteration in the will.

But notwithstanding this, it cannot be laid down as a general rule, that the turning of a *legal* estate into an *equitable* one will not be a *revocation*; for if a man seised in fee, devises, and afterwards conveys in trust for himself, this certainly would be a *revocation*, and differs from 2 *Vern.* 495. and from *Ogle v. Cooke*, which were to let in particular securities and made no alteration, but just so far, *pro tanto*. And if Mr. *Freeman* had only taken a fee in the lands in question, and nothing more, it would have been no *revocation*; but it is most plain (though there be no proof) they came to a new agreement, to wit, that she should be let in to join with him in an appointment, and he, in consideration thereof was to have a fee in *that* estate wherein, before, he had only an estate for his life. And though it is said, that as to the particular estate in question, it was only turning an *equitable* into a *legal* estate, yet it ought to appear that *that* was singly the purpose, but here it appears it was to vary his interest in the other lands, which differs this from all the cases of *revocation pro tanto*, for the recovery and uses were to operate over the whole fee of both.

Suppose

Suppose a man seised in fee devises, and afterwards makes a settlement on himself for life, remainder to his first and other sons in tail without trustees to preserve contingent remainders, the fee is in him until a son is born, and if no son be ever born the fee will never be out of him, there can be no doubt but this would be a *revocation* of his will, though no son ever born; the case of *Lord Lincoln v. Roll* is a strong case to this purpose. In the present case the power of appointment was such a particular purpose as might operate over the whole fee of both estates whenever they pleased; and if Mr. *Freeman* had been seised of a legal fee, and had had a mind to let in his wife to join with him in such an appointment, he must have made a new conveyance for that purpose, which would certainly have been a *revocation*. And *The case of Titner v. Titner* determined by a learned judge, is a very strong authority, and very apposite to the present case. Decreed it a *revocation* of the will.

Todd *versus* Dodd. B. R.

Warrant of attorney to confess judgment to two, one dies before the judgment entred, leave given to the survivor to enter it.

RICHARD Dodd executed a warrant of attorney dated May 8, 1746. to confess a judgment for 400*l.* to *John Todd* the elder and *John Todd* the younger; *John Todd* the elder is dead, and now it is moved by Mr. *Williams*, that *John Todd* the survivor and executor might have leave to enter up judgment upon affidavit that this warrant of attorney was given by the defendant to the two *Todds* to secure and indemnify them against a bond which they entred into on the behalf of the defendant for 200*l.* which appeared to be so by an indorsement upon the back of the warrant of attorney. Cases cited, *Perk. Feoffment* f. 192. 1 *Inst.* 52. *a. b.* 8 *Rep.* 82. *Salk.* 87. *Ld. Ray.* 849. *Sir T. Ray.* 18. *Salk.* 400. 1 *Sho.* 91. *Ro. Abr.* 331. tit. *Authority.* *Salk.* 117. 1 *Barnes* 35. *Still v. Still* in C. B. 2 *Barnes* 38. *contra.*

The last resolution of the Common Pleas was, that the power ought to be strictly pursued; but notwithstanding *that* case, the whole court of B. R. after time taken to consider, gave leave to the plaintiff *Todd* the survivor to enter up judgment, and they said this was a stronger case than any that had been cited.

Smith *versus* Evans. In Scaccario. At Serjeants Inn,
Dec. 6, 1751.

IT was said by Lord Chief Baron *Parker*, Baron *Clive*, and Baron *Smythe* (*absente Legg*) that what is said by *North*, *Windham*, and *Charlton* in 3 *Lev.* 1. "That putting a seal to a will is a sufficient signing within the statute of frauds and perjuries", is very strange doctrine; for that if it was so it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead, for he would have no occasion to forge the testator's hand. And the Barons said if the same thing should come in question again, they should not hold that sealing a will only, was a sufficient signing within the statute.

Sealing a will is not a sufficient signing of it within the statute of frauds and perjuries.

Lake *versus* Lake. In Chancery, Nov. 8, 1751.

THIS was a bill preferred by the testator's next of kin against his widow, who was his executrix, to have a distributive share of the personal estate undisposed of, the testator having given her by his will a legacy of 1400*l.* upon condition that she did not suffer (a bond which he gave upon his marriage with her to leave 400*l.* to such children as they should have) to affect the assets, and they never had any children; he also left her an estate in land.

Parol proof admitted that the testator intended his wife executrix should have the residue.

The widow executrix insists she is well intitled to the residue notwithstanding this legacy and the devise of lands to her, for that the testator has frequently declared his intention that she should have the residue, and this the defendant has in proof.

For the plaintiff it was objected that the testator's parol declarations ought not to be admitted; the evidence is that the witness in travelling with the testator, who was not very well in health, and talking of serious things, the testator said he had done very handsomely for his wife, and that he had done very well also for his sister and brother, and said that after his debts and legacies were paid he hoped there would be something very handsome for her besides; that he had given his wife half of his money in a sum certain, and if she had good luck in getting in his debts, there would be something more, which would be all her own.

Per Lord Chancellor: If making a wife executor of itself should be allowed to be a good reason why she should have the residue when she has a considerable legacy, we shall not know where to

stop; but where a wife is executor, and there is a great affection proved to be between them as here is, it is very reasonable to admit this kind of parol proof, and a less evidence than this would have turned the scale in her favour; therefore the bill must be dismissed.

Hilary Term

25 Geo. 2. 1752.

Nota; The year of our Lord 1751 consisted of no more than 282 days. The year of our Lord 1752 began upon the 1st day of *January*, and consisted of no more than 355 days, from the 2d to the 13th of *September* this year both inclusive being expunged out of the calendar, in order to reduce it to the New Style.

Lewis *versus* Willis. B. R.

Nil habuit in tenementis is a bad plea to an assumpsit for the use and occupation.

INDEBITATUS *assumpsit* for the use and occupation of lands; the defendant pleads *nil habuit in tenementis* at the time he permitted the defendant to occupy the lands; plaintiff demurs. *Per curiam*, This is a bad plea to an action upon the case for the use and occupation, and so it was determined in the case of *Richard v. Holditch*, *Hil. 13 Geo. 1.* but in debt for rent upon a lease not indented, this plea may be pleaded, because an interest passes by a lease; besides the plea is ill pleaded, for it ought to say that the plaintiff had nothing in the tenements at the time of the action, nor at any other time; there is no occasion for the plaintiff to shew any title upon these contracts. *Vide stat. 11 Geo. 2.*

Wallop

Wallop *versus* Irwin. B. R.

THE defendant died *after* the rule to plead was out, but *before* the time given to him by a Judge's order for pleading was out, and the plaintiff signed an interlocutory judgment, and sued out a *scire facias* thereupon against the defendant's executor upon the *stat. Will. 3. c. 11. s. 6.* to shew cause why damages should not be assessed and recovered; Mr. *Ford* moved to set the proceedings aside, alledging that the writ abated by the death of the defendant before interlocutory judgment was signed notwithstanding the rule to plead was out; and cited the case of *Sibert v. The executor of General Russell*, Mich. 9 Geo. 2. where it appeared the General died at Bath a day or two before the time for pleading was expired; Lord *Hardwicke* and the court held the suit abated. Proceedings set aside as irregular.

Defendant died before the time given to plead expired, judgment signed after and process thereon are irregular.

Wingfield *versus* Stratford & al'. B. R.

TROVER for a gun; the defendants plead that the plaintiff kept the gun to kill game, and not being qualified, they justify (as game-keeper and servants to J. S. lord of the manor,) the taking away the gun from the plaintiff; but the plea doth not alledge that the plaintiff was out sporting with the gun, nor where the gun was taken; plaintiff demurs.

A gun is not an engine to kill game.

And the court held that a gun is not necessarily to be taken to be an engine to kill game, as it does not appear upon this record that the plaintiff killed game with it; he might use it to shoot crows, or destroy vermin; and it is not like nets and pointers, and such dogs, which can only be kept for killing the game. Judgment for the plaintiff. *Vide 2 Stra. 1098.*

Rex *versus* Eliz. Spenser.

THE defendant was indicted for perjury, put in bail, was tried and acquitted, and now the bail moved that they might be discharged from their recognisance; the clerks of the crown-office opposed this, and said the course of the court was, not to discharge the bail until the acquittal of the defendant was entered upon record.

One acquitted of perjury, the bail shall be discharged though the acquittal be not entered of record.

Wright and *Denison* Justices, at first doubted, and were for respinding the recognizance until the next term; but *Foster* Justice *totis viribus* insisted the bail ought to be discharged, for that by the *posse* in

in court it appeared the defendant had been acquitted, and cannot be called upon again for the same charge, and he said if the court should respite the recognizance till next term (which would cost no less than 1*l.* 6*s.* 8*d.*) it would be establishing a practice for the benefit of the clerks in court, to the prejudice of the subject, which he could never agree to. Afterwards *Wright* and *Denison* (*absente* Ch. Justice *Lee*) concurred with *Foster*; and the recognizance was ordered to be discharged; and they said if any body was aggrieved by this order, let them apply to the court next term, if they think fit.

Murray *versus* Wilson. B. R.

THIS is an action of debt upon a judgment of nonsuit in an inferior court; the declaration is as follows:

Debt upon a
judgment of
nonsuit in an
inferior court.

Surry (to wit) *Robert Murray* complains of *George Wilson*, being in custody of the marshal of the *Marshalsea* of our Lord the now King, before the King himself, of a plea that he render to him 3*l.* 19*s.* 4*d.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; for that whereas the said *Robert* heretofore, that is to say, at the court of record of our Lord the now King of the liberty of the mayor, commonalty and citizens of the city of *London*, of their town and borough of *Southwark* in the county of *Surry* aforesaid, held at the court-house within the town and borough aforesaid, and within the jurisdiction of the said court, on *Monday* the 19th day of *November* in the 24th year of the reign of our Lord the now King, before *William Moreton*, Esq; then steward of the said court, according to the custom of the said town and borough aforesaid, from time whereof the memory of man is not to the contrary used and approved of within the town and borough aforesaid, by the consideration of the said court recovered against the said *George* 3*l.* 19*s.* 4*d.* for his costs and charges by him laid out and expended in and about his defence, in a certain plea of trespass on the case on promises by the said *George* in the said court of our said Lord the King of the borough and liberty aforesaid, before then commenced and brought against the said *Robert*, adjudged to the said *Robert*, and at his request in and by the said court, for that the said *George* did not further prosecute his plaint in the said suit, but became nonsuit therein; whereof the said *George* was convicted, as by the record and proceedings thereof remaining in the said court at *Southwark* aforesaid may more fully and at large appear, which said judgment still remains in its full force, strength and effect, not reversed, vacated, annulled, discharged or satisfied; and the said *Robert* hath as yet obtained execution of the aforesaid judgment, whereby an action hath accrued to the said *Robert* to demand and have of the said *George* the said 3*l.* 19*s.* 4*d.* yet the said *George*, though often requested, hath not

yet rendered the said 3*l.* 19*s.* 4*d.* or any part thereof to the said Robert, but to render the same to him hitherto hath and still doth wholly deny, to the said Robert his damage of 10*l.* and therefore he brings his suit, &c.

To this declaration the defendant has put in a general demurrer, and the plaintiff has joined in demurrer, which is entred of Easter term last, *Rotulo* 373.

Mr. Weller for the defendant objected, That debt upon a judgment of nonsuit in an inferior court would not lie; and 2*dly*, That if it will lie yet the declaration is bad in substance, for it does not appear that the plaint in the court below was levied for a cause of action arising within its jurisdiction; and 3*dly*, The declaration ought to have set out the plaint and the subsequent proceedings thereon, and cited some old cases to shew this.

Mr. Wilson for the plaintiff: At common law neither plaintiff nor defendant had any costs, they were given to the plaintiff by the *stat. of Gloucester*, 6 *Ed.* 1. but the defendant had no costs until (above 50 years after that time) by the *stat.* 23 *Hen.* 8. *c.* 15. it was enacted, that if any person after such a day shall commence or sue in any court of record, or elsewhere in any other court, any action, bill or plaint in any of the particular cases there specified, and the plaintiff in such action shall be nonsuited, or a verdict pass against him, that the defendant shall have judgment to recover his costs, &c.

This being found to be a beneficial law with respect to the particular actions to which it extended, the legislature by the *stat.* Jac. 1. *c.* 3. extended it to defendants in every action wherein the plaintiff or demandant might have costs if judgment should be given for him, and to have the like process against the plaintiff as by the statute of 23 *Hen.* 8.

One or both of these statutes create the debt or duty for which the present action is brought, and there is no doubt but the action well lies here if the declaration has sufficiently shewn the cause of it. The substance of these two statutes is no more than *this*, viz. That if a plaintiff commences an action, in any court whatever, is nonsuited, or have a verdict against him, and costs adjudged against him by that court, the defendant shall have process to recover. All this matter the present declaration shews with the utmost clearness and certainty.

For the plaintiff therein sets forth, that he, at a certain court of record, held at a certain place within its proper jurisdiction on the 19*th* of November 24 *Geo.* 2. before the judge of that court, by

consideration of the court recovered against the present defendant 3*l.* 19*s.* 4*d.* for his costs expended about his defence in a plea of trespass upon the case, by the defendant in the same court commenced against the present plaintiff adjudged to him at his request by the same court, for that the said *George Wilson* did not further prosecute his plaint in *that* suit, but became *nonsuit* therein whereof he was convicted *prout per recordum*, &c. here is an action alledged to be commenced or plaint levied, a nonsuit, and costs adjudged within the proper jurisdiction.

Debt lies upon a judgment of nonsuit for 16*s.* costs in an inferior court, upon the *stat.* 23 *H.* 8. *Harwood v. Fairbourne*, *Cro. Eliz.* 96. and to the like purpose is 1 *Leon.* 316. case 344.

Having shewn that the action well lies, it will be proper to answer the objections taken to the declaration, which seem to go rather to it's brevity than its substance.

It must be admitted, that formerly, in actions of this kind the superior courts required greater exactness, and particularity in setting forth the whole process of the suit in the *court below* from the *pledges* to prosecute to *final judgment*; but, of later years, a greater latitude and more general way of pleading proceedings in courts hath been allowed. Antiently if a man pleaded a judgment recovered in a court in this hall, he set forth the whole record *verbatim*; afterwards they came to allow of a *taliter processum fuit*, and an abridgment of the proceedings; and lastly they allowed a *recuperavit* only to be well enough, because all proceedings in superior courts were presumed to be regular until the contrary was shewn: but this concise way of pleading was a long time denied (in respect) to inferior courts, because they were tied to stricter forms, and therefore were forced to set out the whole process. However at length a *taliter processum fuit* was allowed to inferior courts, provided still they were courts of record; and now this short method is at last allowed in pleading a justification under a recovery in an hundred court, because the whole process must be given in evidence; so that such a formal nicety, and tedious prolixity is not now required; but our learned judges in these later and happier days have rather been *astuti* to do justice, than to find out little slips in pleadings.

To shew this, 2 *Lev.* 81. *Doe v. Parmiter*; trespass for taking the plaintiff's cattle; the defendant justifies under a plaint levied in an hundred court by the plaintiff against *J. S.* whereupon *taliter processum fuit* that the plaintiff was nonsuit, and costs taxed, and precept to levy, by which he took the cattle *absq' hoc* that he was guilty before the delivery of the precept or after the return; the plaintiff demurred, and it was objected that this short way of pleading

pleading a judgment in inferior courts is not allowable; but the objection was over-ruled and the court said the pleading was well enough. For the like purpose 3 *Lev.* 403. *Patrick v. Johnson* 2 *Mod.* 102. *Lane and Robinson.* And 2 *Mod.* 195. *Higginson and Martin.*

But it is further objected that the declaration is ill, because it does not alledge that the plaint was levied for a cause of action arising within the jurisdiction.

In answer to this objection, it may be admitted that if this had been an action brought by one who was plaintiff below and had recovered there, the objection might have had some weight in it, and it might perhaps have been incumbent upon him to have shewn that every step he himself had taken in the inferior court in which he was the actor was legal and regular, and that his cause of action arose within its jurisdiction; but surely it cannot be necessary for the present plaintiff, who was defendant below to shew that the plaintiff there proceeded legally. Suppose *Wilson* the plaintiff below had no cause of action at all (which is really the truth) how could it with truth be alledged that the plaint was levied for a cause of action which arose within the jurisdiction; and if it be necessary to alledge this, it must be necessary to prove it, and that would have been impossible.

Suppose there is not one legal or regular step in *Wilson's* process below, yet if the nonsuit be properly recorded, *that* is a sufficient ground for the present plaintiff to maintain this action, and is the only *gift* thereof; for this purpose *Hob.* 219. *Drury v. Fitch*: this was an action for words not actionable, and at the trial the plaintiff was nonsuit; and now it was said by his counsel that the defendant was to have no costs, because the words are not actionable; but Lord *Hobart* says, "I was of a contrary opinion, for the words of the law are plain and general that the defendant shall have costs of the nonsuit, and the vexation is more gross if there were no cause of action, for else a man might sue with more safety where he had least cause, and so costs adjudged." So in the present case it must be taken upon this declaration, which is admitted to be true by the demurrer, that the defendant *Wilson* commenced a suit in a court below for a cause of action which he could not prove at all, or could not prove that it arose within the jurisdiction. To the like effect are *Palm.* 147. 2 *Ro. Rep.* 213. *Palm.* 365. *Hob.* 284. *Styl.* 149. *Heyler's case,* *Cro. Car.* 175.

The court gave judgment for the plaintiff upon the first argument, and said, that the declaration was a very good one both in form

form and substance; the nonsuit is laid to be given and recorded at a court held within its proper jurisdiction, and that is sufficient, and the plaintiff below's process may be illegal from beginning to end for ought we know; and the declaration would have been good upon a special demurrer. And they held the argument for the plaintiff, and the cases cited, to be good law.

Baugh *versus* Price. In Scaccario.

Articles and conveyances set aside for fraud and imposition.

THIS bill was preferred by the plaintiff who is the son and heir of *Thomas Baugh*, who was the son and heir of *Rowland Baugh*, to set aside articles, and several deeds and conveyances under them made by the plaintiff's father *Thomas* to the defendant.

In *October* 1739. *Rowland Baugh* the grandfather was about 72 years old, afflicted with the gout and a rupture, and his life not worth above one year's purchase, being tenant in tail of an estate called *Stonehouse* with remainder to himself in fee, worth about 3000*l.* his son *Thomas* being heir expectant in tail and in necessitous circumstances, by articles of agreement of the 21st of *October* 1739. in consideration of 1500*l.* to be paid to him by the defendant within a year, and of an house in *Prisstein* worth 200*l.* to be conveyed to *Thomas Baugh*, he covenanted to convey to the defendant the said estate in fee simple, subject to the estate for his father's life; soon after the signing the articles *Thomas Baugh* was desirous of being off the bargain, but the defendant would not let him; so on the 3^d of *November* 1739. a lease and release was prepared by the defendant, (who is an attorney) and executed that day at his house when no body besides the defendant, his son, and another person, were present; *Thomas Baugh* among other things covenants that he is seised in fee, and there is a clause of warranty against *Rowland* and his heirs, and the use of a fine formerly levied by *Thomas* is declared to defendant in fee, and in consideration thereof he conveyed to *Thomas* the house at *Prestein*, but in that conveyance there is no such covenant or clause of warranty; the 1500*l.* in money to be paid; the defendant makes out that he paid it thus, viz. that he paid off to *Lord Oxford* 550*l.* owing to him by *Thomas* upon a mortgage of another estate (which was as much as the same was worth); 200*l.* *Thomas* owed to defendant; 250*l.* which defendant pretended he paid him in cash; and for the remaining 500*l.* he gave *Thomas* a bond to pay it within a limited time after *Thomas Baugh* should have suffered a recovery to defendant's use.

Old *Rowland B.* died the 8th of *July* 1740. having lived no more than nine months after the making the articles, whereupon *Thomas* writes a letter to *Price* acquainting him with his father's death, and tells

tells him that he shall act in all respects agreeable to his wishes; in another letter he tells *Price* he shall always act justly, and says that *Price* has got a good bargain of him, that he might afford to give him a *buck*, but says he shall not touch one without *Price*'s consent.

After *this*, in Feb. 1740. *Thomas B.* filed his bill in Chancery to set aside these articles and conveyance and to be relieved, to the same effect as the present bill; the defendant *Price* put in his answer thereto, and denied the fraud charged.

Thomas B. being at that time indebted to *Price* in 100*l.* which he was to give *Price* with his son as clerk to him, was threatened to be sued for it, and by other arts of *Price* was intimidated from proceeding in Chancery; nay *Price* was not content with *Thomas B.*'s stopping the proceedings in Chancery, but insisted upon some satisfaction to be made to him for the aspersions he pretended had been cast on him by that bill, and accordingly prevails upon *Thomas B.* to execute a deed dated October 1741. reciting the proceedings in Chancery, and that the purchase was a fair one, and *Thomas B.* thereby confirms and releases the estate to *Price*; soon afterwards *Thomas B.* and *Price*, with the assistance and intermediation of one Doctor *Thomas* (to whom *Thomas B.* applied) settled all accounts, and *Thomas Baugh* seemed so well satisfied that he thanked Doctor *Thomas* (who appears as a common friend to both) for his kindness. In 1743. *Thomas B.*'s bill in Chancery was dismissed, and in 1746. he died. The present plaintiff his son soon after preferred this bill to be relieved upon paying the purchase money and interest to *Price*, and all necessary and permanent repairs.

At the hearing of the cause which lasted eight days, two questions were made; 1st, Whether the articles and conveyance were obtained by *fraud and imposition*; and 2^{dly}, If they were, whether *Thomas Baugh* by any subsequent act had purged that *fraud or imposition*. And after time taken to consider, the Barons were unanimously of opinion for the plaintiff upon both points, and gave their judgment *seriatim*.

Baron *Smythe*: There can be no doubt at all but as this case stood originally, and at the time it was depending in Chancery, that court would have relieved. Here is a son who is remainder-man in tail (in the life of his father old and infirm) not knowing the value of the estate, trafficking with an *attorney*, who had transacted business for his father and him 26 years, had seen the family settlement, and is taking advantage of the son's necessitous circumstances, and purchasing his estate for half the real value of it. *Price* draws all the writings himself, *Thomas B.* has no draught or copy, nor any attorney or counsel concerned for him; here is no valuation made of

the estate, the whole transaction kept a secret from old Rowland; Price seems to have made *Thomas B.* do just what he pleased, made him covenant that he was seised in fee, which *Price* knew he was not, makes him enter into a warranty; so that *Thomas B.* must certainly be guilty of a breach of covenant, for he was not seised in fee; and yet *Price* swears he only bought of him a remainder in tail, though *Thomas B.* has actually conveyed an absolute fee, and not a base fee or determinable, so that the articles and conveyance are fraudulent upon the face of them. Another fraud is the keeping back 500*l.* on the bond to be paid in a month after suffering a recovery; and if what *Price* says be true, that he only bought a remainder in tail, he had no right to oblige *Thomas B.* to suffer a recovery to bar the remainders over.

The 2d question is, whether the subsequent acts of *Thomas B.* will bar the plaintiff; and I am of opinion they will not, and that he ought to be relieved.

It is strongly insisted upon for the defendant that the letters from *Thomas B.* to defendant soon after his father's death shew that he thought the bargain a fair one; but to this it is rightly answered, that they were written soon after his father's death, before his eyes were open, and before he knew the real value of the estate; for he not long afterwards preferred his bill in Chancery, and I think the arts and threats used by *Price* to stop *that* suit were as fraudulent as the original bargain, and the recital in the release executed thereupon is false, for the bargain was a very unfair one, and *suppressio veri*, or *suggestio falsi*, have always been held sufficient to set aside a release. 1 *Vern.* 20, 32. 1 *Wms.* 240. *Thomas Baugh* was made to think that his suit was without any good foundation, and to fear that he should be liable to costs, and if the purchase was at first fair it wanted no confirmation; *Thomas B.* was never fully apprized of his right, but was continued in a state of delusion by *Price* till his death, who imposed upon him in every transaction.

It was further objected for the defendant, that *Thomas B.* all his life, stood by and saw *Price* laying out great sums of money in repairs and ornamental additions, &c. But to this it is rightly answered that *Thomas B.*'s acquiescences were founded upon a mistake into which *Price* had led him. I think *Price* should be allowed for all necessary repairs; relief has been often granted in similar cases. 1 *Vern.* 167, 205, 237, 443. 2 *Vern.* 14. 1 *Wms.* 310.

The case of *Cole v. Gibbons*, 3 *Wms.* 290. was strongly relied upon by the defendant's counse; but *that* case differs very materially from *this*; *that* was not the case of an heir in the life of his father,

nor of a remainder-man or reversioner, nor was there any fraud in the original bargain in *that* case upon which Lord *Talbot* laid great stress, the party *there* confirmed the bargain when he was fully apprised of every thing; but in this case at bar here is fraud in every transaction appearing by written evidence which cannot err, for *Thomas B.* was deluded from first to last; and the case of *Lord Chesterfield* and *Jansen* stands quite clear of fraud, so nothing like this case.

It is the policy of the nation that such bargains as this should not stand; and if the courts of justice were to hold them good, it would be to encourage extravagance and disobedience in young heirs on one had, and avarice, fraud and imposition on the other, and therefore I am of opinion that the articles and deeds ought to be set aside upon the plaintiff's paying the defendant his principal and interest, and that the defendant be allowed for all needful repairs, and that the plaintiff be paid his costs till this time, and that the subsequent costs be reserved till the coming in of the master's report.

N. The rest of the Barons delivered their opinions to the same effect, so there is no occasion to set them down; they said there was no instance where the original contract was fraudulent, that any subsequent act could purge it, and that, by stopping the suit in Chancery and the release thereupon given, the *fraud was double batched*, and that the transaction was iniquitous from beginning to end. All the Barons held that *Thomas Baugh* was of sufficient age, and capable of transacting business; and though it was insisted for the plaintiff that *Thomas B.* was made drunk by *Price* at the time of executing the articles, yet *that* not being fully proved, it was laid quite out of the case, and he was considered as sober at the time. It was also said that *Price* had put *Lord Oxford* upon calling in his 550*l.* to distress *Thomas B.* but *that* was not proved, so was laid out of the case; but it appeared clearly *Thomas B.* was in necessitous circumstances.

Easter

Easter Term

25 Geo. 2. 1752.

Herbert *versus* Williamfon. B. R.

Upon a trial
of a feigned
issue costs must
follow the
verdict, and
the court has
no discre-
tionary power
to give or not
to give costs.

WHILE an action of trespass was depending to try whether the *park and castle lands* were within the township of *Kendall* in the county of *Westmorland*, and so liable to be rated to the poor of that town, Doctor *Rotheram* the dissenting minister there, wrote a *pamphlet* to prove that the *park and castle lands* were within the township, whereupon the court was moved that an information might go against the *Doctor* and the *publisher*, upon an allegation that this pamphlet was written on purpose to influence the jury of the county of *Westmorland*; when they came to shew cause it was proposed and agreed by the counsel on both sides, and by the court, that it might be tried at *Lancaster* upon a *feigned issue*, whether the *park and castle lands* were within the township of *Kendall*; accordingly the cause was tried at *Lancaster* and a verdict was found for the defendant that they were within the township. Upon the return of the *postea* the master refusing to tax costs upon this *feigned issue* which was come into by *consent*, therefore it was moved that the master might be obliged to tax defendant his costs.

And upon debating this matter by five counsel of a *bench* *Wright*, *Dennison* and *Foster* Justices (*absente* C. Justice *Lee*), were clear that the court in this case had no discretionary power as to costs, but that costs by law must follow the verdict, and that the matter is not a new question, but was determined in this court 1 *Annæ*, between *Still* and *Rogers*, where a *feigned action* was ordered to be tried at the assizes, upon an issue directed by this court upon a matter in the crown office, and there was a verdict for the plaintiff, and he had his costs. *Lilly's Abr.* 477. which book *Wright* Justice said, was of authority in matters of practice; and upon search made in the office this is found to be so. *Nicholls* was also a *feigned issue*, and costs followed the verdict; and this is always so when a *feigned issue* is directed by a court of law, but when an issue is directed by the court of Chancery then this

gives no costs, but the finding of the jury is returned to the *Chancery*, and costs there are in the discretion of *that court*, because the *statutes* giving costs do not extend to *courts of equity* as they do to *courts of law*.

The Master was ordered to tax the defendant his costs.

Rex *versus* Johnson and five others. B. R.

THIS is an indictment which charges that the six defendants, together with several others, unlawfully assembled to disturb the peace of the King, upon the 22^d of August in the 24th year of King Geo. 2. with force and arms broke and entered the mine of B. and J. S. and unlawfully took and carried away — pounds black lead, *contra pacem*, &c.

Indictment against six persons for entering a lead mine and carrying away lead, not quashed upon motion.

It was moved by Mr. Clayton that this indictment might be quashed, alledging that *this* was a mere action of *trover* or *trespass*, and not a matter of *public concern*; and cited *Rex v. Archer*, Hil. Geo. 2. *Rex v. Man*, same term. Trin. 15 Geo. 2. *Rex v. Russell*, and *Rex v. Dunn*, Pas. 17 Geo. 2. *Rex v. Gad or Guest*, Pas. 22 Geo. 2. *Rex v. Mason*, Hil. 11 Geo. 2.

On the other side it was said for the prosecutor, and resolved by the whole court, that the number of persons assembled together, distinguished this case from all the cases cited, and the defendants are not entitled to any indulgence from the court; and if the word *riot* had been in the indictment, it might have been easily proved, for this assembling was at a time in *Cumberland* when the Judges were trying other persons for the like offence at *Carlisle*; therefore the defendants may demur if they think fit, for it is in the discretion of the court, whether they will quash any indictment whatever upon mo-

Watson *qui tam* *versus* Jackson. B. R.

THIS was an action *qui tam* by a common informer upon the statute for killing game; Mr. Clayton moved for judgment as if of a nonsuit, and obtained a rule for the informer to shew cause this term; no cause being now shewn, the rule was made absolute.

Judgment as in case of a nonsuit against an informer *qui tam* upon the game law.

Kenrick *versus* Taylor. B. R.

In an action
for disturbing
plaintiff in his
pew, the
plaintiff need
not lay or
prove that he
repaired it
against a
stranger; al-
iter in a dis-
pute with the
ordinary.

THIS is a special action upon the case against the defendant for disturbing the plaintiff in his pew in the south isle of the church of *Wrexham* in the county of *Denbigh*, which he claims by prescription as appurtenant to his messuage in the parish; the declaration sets forth, that the plaintiff and all those whose estate he hath in the said messuage have time out of mind repaired the pew. Upon Not guilty pleaded, there was a verdict for the plaintiff, subject to the opinion of the court, upon a case which stated that at the trial there was no evidence given that the plaintiff, or any of the owners of the messuage, had ever repaired or been obliged to repair the pew, or that the pew had ever wanted repairing.

This case was argued in *Hilary term* 24 Geo. 2. by the Honorable Mr. *Bathurst* for the plaintiff, and Mr. *Moreton* for the defendant; and the single question was, whether the plaintiff can maintain this action without proving repairs done to the pew.

2 Lev. 241.
Salk. 551.
Comyns 7.

It was argued for the plaintiff, that as this was an action by one in possession against a mere stranger and wrong doer, that there was no necessity to prove any repairs; and that there was a great difference between an action against a stranger, and a contest with the ordinary in *prohibition*; for at common law the ordinary has the disposal of all the seats in the church, and although they be built and repaired at the charge of the whole parish, yet *that* will not oust him of his jurisdiction, and therefore a special title must be shewn against him by building or repairing the seat. 1 Lev. 71. Sir *Thomas Jones* 3, 4. but possession alone is sufficient to maintain this action against a stranger.

2 Rol Abr.
288.
Hob. 69.
3 Inst. 202.
Comyns 366.
T. Raym. 52.

On the other side it was insisted that the church and seats are as free to all the parishioners as the market or highways, unless can be shewn that any particular parishioner was placed in a certain seat by the authority of the ordinary, or built and has repaired it. And Lord *Hales* in a case like this at *Winchester* directed the jury to find for the defendant, because there was no proof that the plaintiff had ever repaired the seat. 1 Sid. 203.

Lee Ch. Justice, *Denison* and *Foster* Justices, inclined to think that the plaintiff had no occasion to prove repairs; but *Wright* Justice being inclined to think the contrary, time was taken to confer until this term, when the opinion of the whole court for the plaintiff was delivered by

Lee Ch. Justice: It is objected for the defendant that as repairs were laid in the declaration and not proved at the trial, the *postea* ought to be delivered to the defendant; but we are all of opinion that this being a *possessory* action against a stranger, and a mere wrong-doer, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he hath; for it is a *rule in law* that *one in possession need not shew any title or consideration for such possession against a wrong-doer.*

But it is otherwise where one claims a pew or an isle in a church against the ordinary, who undoubtedly has *primâ facie* the disposal of all the seats in the church; and against him a title or consideration must be shewn in the declaration and proved, as the building or repairing, &c. And this is the true distinction. 3 *Lev.* 73.

The whole court were clearly of opinion that possession and laying it to be appurtenant to the house, without laying or proving that plaintiff repaired the pew, was sufficient against a mere stranger, and relied upon the case of *Burton v. Bateman*, 1 *Sid.* 203.

Judgment for the plaintiff.

Trinity Term

25 & 26 Geo. 2. 1752.

Perkins, assignee of Hughes a bankrupt, *versus* Smith.
B. R.

Trover lies against a servant who disposes of goods the property of another to his master's use, whether he has any authority or not from his master for so doing.

IN *trover*, the jury find a special verdict which in substance is shortly this. That upon the 22^d of September 1749. Hughes was possessed of the goods in the declaration as his own property, and became a bankrupt that day, that the plaintiff is assignee under the commission; that upon the 23^d of September 1749. the defendant Smith, who is servant and riding clerk to Mr. Garraway to whom the bankrupt was considerably indebted, went to the bankrupt's shop (to try to get his master's money) and found it shut up, and that the bankrupt delivered to Smith the goods in the declaration, who gave a receipt for the same in the name of his master, and sold the same for his master's use.

It was objected that the action was improperly brought against the servant Smith, who acted wholly in this matter for his master, and that the *conversion* is found to be to the use of his master, which is the gift of an action of *trover*; after two arguments at the bar, the court gave judgment for the plaintiff.

Lee Chief Justice: The point is, whether the defendant is not a *tort-feasor*, for if he is so, no authority that he can derive from his master can excuse him from being liable in this action.

Hughes the bankrupt had no right to deliver these goods to Smith; the gift of *trover* is the *detainer* or *disposal* of goods (which are the property of another) *wrongfully*; and it is found that the defendant himself *disposed* of them to his master's use, which his master could give him no authority to do; and this is a *conversion* in Smith, this *disposal* being his own *tortious* act; the act of selling the goods is the *conversion*, and whether to the use of himself, or another, it makes no difference; I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master before, or after the fact, can excuse him.

The

The finding that the defendant disposed of the goods for his *master's use* is only the conclusion of the jury, and does not bind the court, the taking upon him to *dispose* of another's property is the *tortious act*, and the *gist* of this action. Judgment for the plaintiff *per totam curiam*.

Rex *versus* Simmons a Jew. B. R.

THE jew was indicted for putting into the pocket of one *Ashley*, three *ducats*, with a malicious intent to charge him with felony, and was tried before Mr. Justice *Foster* at the last assizes for the county of *Essex*, and found guilty generally as to all the counts in the *indictment*.

New trial granted for the defendant in a criminal case, upon the report of the judge and affidavits of the jury that the verdict was taken contrary to their meaning, and to the judge's direction in point of law.

The court was moved for a new trial upon the *affidavits of all the twelve jurymen*, "that they only intended to find the defendant guilty of putting the *ducats* into *Ashley's* pocket, and did not intend, or understand that they had found him guilty of putting the *ducats* into his pocket *with an intent to charge him with felony*; and *Dodson* the foreman swears that he declared at the bar to the court when they brought in their verdict, *that they found the defendant guilty of putting the ducats in Ashley's pocket, but without any intent.*"

Mr. Justice *Foster* reported, That after the evidence was gone through and summed up, the jury departed from the bar to consider of their verdict, and gave a private verdict at his lodgings that the defendant was guilty; the next morning they all appeared in court at the bar, and being asked if they stood by their former verdict, they answered they found the defendant guilty. That Mr. Justice *Foster* then told them that there were *four counts* in the indictment, and that the evidence for the King was only applicable to the *third*, which charged the defendant with maliciously putting three *ducats* into *Ashley's* pocket with an *intent* to charge him with felony; and told them that *the intent* was the principal thing to be considered by them, and that if they believed the defendant did not put the *ducats* into *Ashley's* pocket *with an intent to charge him with felony*, they must acquit him, whereupon the foreman at the bar said, "We find him guilty of putting the *ducats* into his pocket without any intent." But by some mistake, or misapprehension of the court, or the jury, or of both, a general verdict was taken that the defendant was guilty.

After this report the jury by further *affidavits* swear that there was a very great noise in court, and that when the judge directed them to acquit the defendant if they believed he did not put the

ducats into Ashley's pocket with an intent to charge him with felony, they did not hear or understand him.

This question having been debated by five or six counsel of each side, the court gave their opinion for a new trial.

Lee Chief Justice: There is no doubt but a *new trial* may be granted in a *criminal* case; and the true reason for granting *new trials*, is for the obtaining of justice; but to grant *them* upon the *affidavits of jurymen only*, must be admitted to be of dangerous consequence. It appears to me from the *report* of my *Brother*, and the *affidavits* of *Dodson the foreman*, that this *verdict* was taken by a mistake, for he swears that he declared in court "that they did not find the defendant guilty of any intent", and therefore this is not granting a *new trial* upon any *after-thought* of the *jury*, but upon what the *foreman Dodson* declared at the bar when they gave their *verdict*. I am very clear in my opinion there ought to be a *new trial*, and the rather, as this is a *criminal* matter.

Wright Justice: *New trials* are generally supposed to be more ancient than appears in the books, for want of reporters when they first began to be granted; every case of this kind must depend upon its particular circumstances; the *jury*, every man of them, come here and tell us that they were not understood, for that they declared at the bar they did not find the defendant guilty of *any intent*. My *Brother reports* that he told them if they did not believe the *intent*, they must acquit him; the *jury* now swear, "they did not hear him"; therefore I am of opinion it is a *verdict misentred*, contrary to the declaration of the *foreman*, not contradicted by any of the rest, at the time it was spoken at the bar; and that it is most plainly *no after-thought*, so that we may keep clear of the danger of granting *new trials* merely upon the *affidavits of jurymen*: I think this man has been convicted contrary to the judgment of his Peers, that he has not had *judicium parium*, and that we are bound to grant a *new trial*; and this being a *criminal* case is more to be favoured as to a *new trial*, than if it had been a *civil* case.

Denison Justice: The court will be very cautious how they grant *new trials* upon the *affidavits of jurymen*, because it would be of very dangerous tendency; but in this particular case, which partly depends upon my *Brother's report*, and partly upon the *affidavits of all the jurymen*, I am very well satisfied there ought to be a *new trial*, because it appears both by the *report* and *affidavits* that this *verdict* ought not to stand, and that the *jury* were mistaken in giving a *verdict* contrary to the direction of the judge; and that is what I principally go upon, that it is a *verdict contrary to the direction of the judge in a point of law*; one of the jury said, "the defendant had

"no intent", then the judge said, "you must acquit him"; some of the jury swear they did not *hear*, others, that they did not *understand* the Judge.

Foster Justice: I am of the same opinion. I gave no direction at all in *point of fact*, only of law, "that if they did not believe the *intent*, they must acquit the defendant"; they told me they did not believe any *intention*; this is a *verdict contrary to law*.

New Trial granted upon payment of costs.

A common Soldier's Case. B. R.

HE was brought up by an *habeas corpus*, whereupon it was returned that he was committed by a justice of the peace as a *vagrant*, being charged by the overseers of the parish of *Saint Ann Sobo* as a *rogue* and a *vagrant*, and running away from his wife and one child, whereby they are become chargeable to the parish. There was also an *affidavit* wherein it was sworn on behalf of the parish, "that he was a watchmovement maker, and could earn 30s. *per week*, and that he refused to maintain his wife and child."

A common soldier cannot be a *vagrant* within the meaning of the stat. 17 Geo. 2.

It was moved by Mr. *Attorney General* that he might be discharged upon an *affidavit* that he was a *soldier*, that he did not run away from *Sobo*, but was billeted at *White Chapple* when he was taken up; no body can say that the common soldiers of the army maintained and kept for the support of our liberties and property are rogues and vagabonds, or idle and disorderly persons within the stat. 17 Geo. 2.

Per curiam, He cannot be a *vagrant* within this act of parliament, so must be discharged.

Tempest *versus* Metcalf. B. R.

THREE feigned issues were directed by this court to be tried, and there was a verdict for the defendant upon the issue of the most material consequence, and for the plaintiff upon the others; and it was moved therefore that the plaintiff might have no costs; but *per curiam*, If any one issue be found for the plaintiff he must have his costs.

If any one issue be found for the plaintiff he must have his costs.

Rex *versus* The Bishop of St. Asaph. B. R.

Attachment may issue against a peer, but for not returning a *fi. fa. de bonis ecclesiasticis*, it is proper to move against the chancellor, commissary or official.

MR. Nares moved for an *attachment* against the Bishop for not returning a *feri facias de bonis ecclesiasticis*.

Per curiam, There is no doubt but an *attachment* may issue against a Peer for refusing to obey the process of the court; but it seems the *chancellor*, *commissary* or *official*, are the proper persons to return these writs; and in *Michaelmas* 6 Geo. 1. in the case of the *King v. Loggen, Chancellor to the Bishop of Salisbury* an attachment issued against him (the Chancellor) for not returning a *feri facias de bonis ecclesiasticis* against one *Jones Clerk*; therefore look into precedents.

Rex *versus* Collier and Cape. B. R.

Judgment upon a conviction to be imprisoned for a month, to ask pardon and advertise it, the latter part is void.

THE defendants were indicted, tried and convicted at *Hicks's Hall* for insulting Mr. *Smith* a justice of peace in the execution of his office at his house in *Ormond street*, found guilty, and adjudged that they should be imprisoned for a month, and ask pardon of the justice at his house, and to advertise it in the *Daily Advertiser*. They having suffered a month's imprisonment, but not asked pardon or advertised, were now brought up by *habere corpus*, and moved to be discharged.

Per curiam, So much of the judgment as is legal has been executed, and they must be discharged, for the other part of the judgment is void.

Rex *versus* The Mayor and Burgeses of Oakhampton. B. R.

A father being a freeman of a borough is a good witness to prove the custom whereby his son is intitled to his freedom.

MANDAMUS to admit *J. S.* to his freedom, as being the eldest son of a freeman; they return there is no such custom, and that no man is intitled to his freedom but by *servitude*; this matter was traversed, and the question at the trial was, Whether by custom every person being the eldest son of a freeman born within the borough be intitled to be a freeman thereof; and the father of *J. S.* who had gained his freedom by *servitude* was called to prove the custom, but was refused to be admitted by the judge who tried the cause, and thereupon there was a *verdict* for the defendants.

It was now moved for a *new trial*, because the father ought to have been admitted to prove the custom. And

Per curiam, There is no reason to say the *father* should be refused, for he has no interest in the question, but rather comes to narrow his own interest which was gained by *servitude*; suppose a legacy be given to a *son*, surely the *father* may be admitted a *witness* to prove the will; the court were very clear, and granted a new trial.

Michaelmas Term

26 Geo. 2. 1752.

Began upon the 6th of November by the late act of Parliament.

Grayson *versus* Atkinson. In Chancery, Nov. 7.

A Testator seised in fee by will expressed himself thus at the beginning thereof: "As to all my temporal estate where-
" with it hath pleased God to bless me, I give and devise
" the same as follows"; then gives several legacies to
A. and directs him to sell all or any part of his real and personal
estate for the payment of his debts and legacies, and desires three
persons to assist him in the sale thereof, and to be supervisors of his
will; and after giving some legacies to others, concludes his will
with this *residuary devise*, viz. "As to all the rest of my goods and
" chattels real and personal, moveable and immoveable, as houses,
" gardens, tenements, my share in the copperas works, &c. I
" give to the said A." without making use of the word *estate*, or
any words of limitation whatever.

Devise.
As to my
temporal e-
state I dispose
thereof as
follows, &c.
and after-
ward says, All
the rest of my
goods and
chattels real
and personal,
moveable and
immoveable,
as houses, te-
nements, &c.
without the
word *estate*,
or other
words of li-
mitation,
passes a fee.

The question now is, what estate or interest A. took in the real estate by this will.

Lord *Hardwicke* Chancellor: I doubted at first, but now am
clearly of opinion, (as the testator had a *fee*,) that A. takes a *fee*;
there is no doubt but the testator when he says, "As to *all* my tem-
poral estate, &c. in the beginning of his will, he intended thereby

to dispose of *all* the estate he had in the world, both with regard to the *quantity* and *quality* thereof. 2dly, There is no doubt but the inheritance is charged with his debts and legacies; and the word *temporal* is here put in opposition to his *eternal* or *spiritual* concerns, agreeable to Lord Talbot's construction in the case of *and* does not mean a life estate or term of years, but as if he had said, "*All my worldly estate*". Yet I do not say but that notwithstanding these words he might afterwards have qualified them, and made more particular, limited, or partial dispositions of his estate; for *intention* at first is one thing, and the *execution* of *that intention* is another.

It appears that he had it in view to dispose of the *whole* when he directs, that *all* or *any part* of his estate should be sold, for it is possible the debts and legacies might exhaust the whole; and though there is not the word *estate*, nor any words of limitation in this residuary devise, yet *A.* takes a *fee* thereby; for what is the word *rest* to relate to but to his temporal estate, which he was disposing of; for he says, "As to the rest of my goods and chattels real and personal, moveable and immoveable, as houses, gardens, tenements, &c. I give them to *A.*" He has here explained by the words, *as houses, gardens tenements, &c.* what he meant by his *goods and chattels real and personal, moveable and immoveable*, but if he had not so explained himself, I do not think that the words *goods and chattels real and personal, moveable and immoveable* would have carried the *lands* by the *law of England*, though they might have so done by the *civil law*; and the word *as* is as much as if he had said, *I mean*, for a man is not confined to make use of *legal technical words* in his will, but may use what words he pleases provided he explains his meaning clearly. *All the rest, &c.* plainly relates to something mentioned before, and *that* mentioned before, *which* he was about to dispose of, was *all* his temporal estate, which passes a fee, when the testator has one. *Vide 2 Vern. 690. 3 Peere Wms. 295. 1 Salk. 234.*

Elliot *versus* Lane. B. R.

Sci fa. against bail, who pleads there was no *ca. fa.* against the principal; replication there was; rejoinder that it did not lie four days in the sheriff's office, this is a departure.

SCIRE facias upon a recognisance of bail; the defendant pleads that the *venue* is in the county of *Southampton*, and the bail was acknowledged in *Middlesex*, and that no *cupias ad satisfaciendum* was taken out against the principal defendant; the plaintiff replies, there was a *ca. fa.* issued and returned *non est inventus*; the defendant rejoins that the *ca. fa.* did not lay four days in the sheriff's office. Demurrer. It was objected for the plaintiff that the defendant's

defendant's rejoinder was a *departure* from his plea; for in his plea he says there was no *ca. sa.* and in his rejoinder admits there was a *ca. sa.* but that it did not lay four days in the office. The court was of opinion that this is clearly a *departure*, and gave judgment for the plaintiff. Cited pro def. 2 Salk. 599.

Emerson *versus* Hawkins and others. B. R.

THE plaintiff makes an *affidavit*, "that the defendants are indebted to him in 103*l.* for goods of the plaintiff, which the defendants have converted to their own use"; upon this *affidavit* the defendants are arrested, and it is now moved by the Attorney and Solicitor General that the defendants may be discharged out of custody upon *common bail*, on an *affidavit* that the defendants are Custom-house officers, and seized the goods as prohibited and uncustomed goods which are now in the King's warehouse, and that a prosecution is now carrying on in the court of *Exchequer* in order that they may be either *condemned*, or that a *writ of delivery* may issue in case they have been unlawfully seized. Affidavit that defendant is indebted to plaintiff in 103*l.* for goods which defendant converted to his own use, is sufficient to hold a custom-house officer to bail in *trover*, and no affidavit can be received to explain or contradict the plaintiff's oath.

Mr. Ford for the plaintiff: The *affidavit* of the plaintiff is positive to a debt, and the court cannot now receive any *affidavit* to contradict or explain it; and this is not like the cases in the *Common Pleas*, where the whole circumstances of the seizure appeared in the *affidavits* to hold to bail; to grant this motion would be to try the cause on *affidavits*, and there would be the same reason for doing so in every case where the defendant can justify; as if a plaintiff swears to his debt, the defendant might come and swear, it is true I owe the debt, but the statute of limitations has run, so pray discharge me upon common bail.

Attorney General: The officers have seized for the benefit of the crown, and the goods are now (as it were) in the custody of the law, and if the plaintiff has a right to them he is in no danger of losing them; they are now out of the power of the defendants, and if officers of the revenue be liable to arrests in these cases it will be a great inconvenience.

Lee Chief Justice: The plaintiff having sworn positively that the defendants are *indebted*, in order to hold them to *bail*, it is the known course of the court that we cannot receive any *affidavit* to explain or contradict the plaintiff's oath; even an *affidavit* of the plaintiff's confession that a defendant owes him nothing cannot be received, and the court have determined that the plaintiff may hold the defendant to bail in *trover*, which is as certain as goods sold; and though the *affidavit* swears that the defendants are *indebted*, it is

is well enough, because the value of the goods is ascertained thereby, and though it may be inconvenient to these officers, yet there would be ten times more inconvenience if we were to try whether plaintiff swears true: they took nothing by the motion.

Griffith *versus* Walker, Esq; Sheriff of Radnorshire.
B. R.

Action against the sheriff for a false return is transitory, for he may make and deliver his return any where, and that which is false is universally so.

SPECIAL action upon the case against the sheriff of the county of *Radnor* for a false return of a *scire facias* issued out of the court of *Exchequer* against the plaintiff; whereupon the defendant returned a *scire feci*; and the plaintiff avers that the defendant did not give him notice, by reason whereof an execution was awarded, and the plaintiff's goods were taken in execution to the plaintiff's damage; this action is laid in the county of *Hereford*, and the fact alledged is, that the sheriff made this return at *Kington* in that county.

The defendant demurs, and shews for cause of demurrer that the return is alledged to be made by the sheriff of *Radnor* in the county of *Hereford*.

It was argued for the defendant that this is a *local action*, and ought to have been laid in the county of *Radnor*, because whatever acts the sheriff does in his office must be done in his own county, or at least the law supposes he does such acts *there*; and 2 *Salk.* 669, was cited as in point to shew that this kind of action must be laid either in *Middlesex*, where the *return* is *filed*, or in the county where it is made.

E contra, It was argued for the plaintiff that the question is not, whether the sheriff can *execute a writ*, or *summon* the party out of his county, but whether he cannot make the *return* in any other county, and it was insisted upon, that he may; it was compared to an action against the sheriff for an *escape* which may be laid in any county in *England*, for an escape in one county is an escape every where. The ordinary may grant administration out of his diocese. *Godb.* 33. and a justice of peace may take an examination as to a robbery out of his county. *Cro. Car.* 211, 212.

2 *Ld. Raym.*
1455.

Lee Chief Justice: It is certain the sheriff may indorse his *return* upon a writ any where; it is laid here, that he did this, and delivered the writ of *scire facias* at *Kington* in *Herefordshire*, and for any thing we know the fact was really done *there*, and the plaintiff has his election to lay his action where he can prove the fact done, and the case of the *Ordinary*, *Godb.* 33. and of the justice of peace. *Cro.*

Hob. 209.
Noy 22.
1 *Mod.* 198.

Cro. Car. 211, 212. are very material in point. The falsity of the return is the cause of action, and that which is *wrong*, is *so* universally and every where, like an *escape*. *Plowd.* 37. *b.* *Styl.* 107. And if the plaintiff had undertaken to give evidence that the sheriff delivered the writ in *Herefordshire*, this court would not have changed the *venue*, if there be matter of *law* or *record* and matter in *pais* in different counties, the plaintiff has his *election* to lay his action in which of the counties he pleases; Judgment for the plaintiff *per totam curiam*.

Jones *versus* Tub. In Error. B. R.

DIGHTON and another became bail for the plaintiff in error, *Dighton* being excepted to, did not justify in court, and so one *Sleeper* was added a bail in his stead and justified; *Dighton* did not apply to the court to have his *name* struck out of the *bail-piece* as he might have done, and afterwards *Sleeper* becoming insolvent, the defendants would have had recourse to fix *Dighton* with the debt, and therefore it was now moved on the behalf of *Dighton* that his *name* might be struck out of the *bail-piece*, which was granted *per totam curiam*; for as he was excepted against and refused to justify, he might reasonably think he was no longer bail, and so did not move to have his *name* struck out *before*.

Bail in error who refuses to justify may have his name struck out of the bail-piece at any time.

Daubers *versus* Pender. In Error.

THIS was a transcript of a record in error from an inferior court, wherein there was a mistake, and therefore it was now moved for leave to amend the transcript by the record below upon payment of costs, because *diminution* cannot be alledged in a record in error from a *base court*; and although it was objected that it does not appear to the court that the record below is right, yet *per curiam*, This has been often done, and the rule in *Reed and Chamley*, *Pas. 4 Annæ*, was produced and read, which runs thus. *Paschæ 4 Annæ. Sabbati prox' post crastinum assensionis domini. Read and Chamley. Ordinatum est quod referatur magistro Clark et quod ipse in præsentia attornatorum ambarum partiûm emendet recordum brevi de errore annexum secundum separales processus in curia inferiore habitos, coram ipso per partes prædictas producend'. Ex motione Jacobi Montague militis.*

Transcript of a record in error from a base court ordered to be amended by the record below to be produced before the Master.

And *Lee Ch. Justice* said he remembered an amendment made upon his own motion, by the minutes of the books of a corporation court of record in the time of *Lord Ch. Justice Parker*, and the books were produced before the Master.

Griffith *versus* Williams. B. R.

Traverse.
Trespass; de-
fendant justi-
fies under a
prescriptive
right to a duty
called *tenfary*,
and to the
like right to
distrain for it;
the plaintiff
traverses the
right to the
duty, without
traversing the
right to di-
strain, and
held good.

TRESPASS for entring the plaintiff's house, and taking and carrying away a *gold ring*. Defendant pleads Not guilty, and a special justification, that plaintiff has an house, and is an inhabitant in the town of *Ofwestry*, which is a corporation by prescription by the name of mayor, aldermen and common council; that there is a prison within the corporation which has been used to be repaired time out of mind by the corporation, and that for time out of mind they have been used to rate and take of every inhabitant not being a burghers, a certain rate called a *tenfary* towards the repairing the prison, and prescribe also that they have been used to distrain for this rate or duty when refused to be paid; that the plaintiff was rated, and refused to pay the duty, and therefore the defendants, as officers of the corporation, justify the taking the *ring*, and the *trespass*; this is pleaded two other ways with little variation.

The plaintiff replies that the defendants are guilty of a trespass of their own wrong; *absque hoc* that the corporation for time out of mind have been used to rate and take of every inhabitant not being a burghers a certain rate called a *tenfary*. There are the like replications to the other pleas. The defendant demurs, and shews for cause that the plaintiff has only traversed the *prescription for the duty*, and not the *right to distrain for it*.

This case was argued twice at the bar, and it was objected for the defendants that the replication is ill, because the plaintiff has only traversed the *right to the duty*, and not the *right to distrain for it*; and if an issue had been taken upon this *traverse* it would not have made a final end between the parties; for suppose an issue had been taken and found for the defendant, it would have been only saying that the defendant had a *right to the duty*, but not that he had any *right to distrain for it*; indeed if a *verdict* had been found for the plaintiff it would have made an end between the parties, but if for the defendant, there must have been a *repleader*. *Comyns* 148. If the *right to distrain* had been put in issue, it would have made an end.

On the other side for the plaintiff it was insisted that if the defendant's plea be false in any material fact, the *whole* falls to the ground, and *that* part of the justification which is not traversed or denied is admitted; so that if there had been a verdict for the defendant upon the issue tendred, it must have been taken upon this record, that the defendant would have a *right to distrain*, because *that* is not traversed or denied by the plaintiff.

The three material facts in the defendants plea, are, The *consideration* for this duty, the *duty* itself, and the *right to distrain for it*; and it would have been sufficient to have put any one of these in issue; and it does not lay in the defendant's mouth to complain that the plaintiff has not put all the prescription in issue, for he has less to prove; the use of pleading is to avoid prolixity, and to prevent judges and juries from being troubled with unnecessary matter. *Co. Lit.* 126, 303.

Some exceptions were taken to the plea, and the custom; but as the *whole court* were of opinion that the *traverse* was well enough, they determined nothing concerning the plea, but seemed to think that such a custom could not be supported. *Denison* Justice said, Suppose a man claims a right to common *pur cause de vicinage* in *A.* and *B.* it was never doubted but a *traverse* of the right in *A.* would be sufficient without traversing *his right in B.*

Judgment for the plaintiff.

Kelly *versus* Devereux. B. R.

THE *affidavit* for holding the defendant to *bail* is made by a third person, who swears "that the defendant is indebted to the plaintiff in a certain sum of money, as appears by a bottomry bond in the deponent's custody, and that the defendant on such a day acknowledged the debt to him, and promised to pay the same to the deponent who has authority from the plaintiff by letter of attorney to receive the same"; it was moved by Mr. *Hume* that the defendant might be discharged out of custody upon *common bail*, for want of a *positive affidavit* of the debt.

Common bail allowed for want of a positive affidavit of the debt.

See ante 121, 231, 232.

For the plaintiff, who was abroad, it was insisted that a more *positive affidavit* than the *present* cannot be made in a case where the plaintiff is abroad, for here is the defendant's confession and promise to pay; and in cases of executors and administrators a more *positive affidavit* cannot be made.

But *per curiam*, There must be a *positive affidavit* of a subsisting debt at the time of making the affidavit and suing forth the writ, and the want thereof cannot be supplied afterward; and in the case of an administrator, who swore to a debt as it appeared by the books of the intestate, it was held insufficient to hold to bail. Mr. *Pratt* for the plaintiff.

Defendant discharged upon common bail.

Rex

Rex *versus* Rook. B. R.

Baron and
feme.
The feme
may be ad-
mitted to
prove the fact
of adultery
with her, but
not to prove
the baron had
no access.

AN order of *bastardy* was made that the defendant should pay 20s. and 1s. 6d. *per week* to the overseers of the poor of the parish of *Kirkby Moorside* in *Yorkshire* towards the maintenance of a *bastard child*, upon the oath of a married woman alone, who swore that her husband was in gaol long before she was got with the *bastard child* and ever since, and that *she* had no access to *him* nor be to *her*, and that *Rook* begot the *bastard*.

And now it was objected by Serjeant *Agar* that the order ought to be quashed, because a wife cannot be admitted to prove that her husband had no access to her.

And so it was ruled by the whole court; and they cited the *King and Reading* in *Michaelmas and Hilary* 8 Geo. 2. where Lord *Hardwicke* said that although a wife might be admitted to prove the fact of *adultery*, yet she shall not be admitted to prove that her husband had no access, because that may be proved by other persons, and an order of *bastardy* could not therefore be made upon her oath alone.

2 Stra. 1076,
925.

The case of the *King* and *The parish of Bedall* differs from this, for there were witnesses to prove the husband had no access; *Per curiam*, As the justices have determined solely upon the evidence of a wife, the order must be quashed.

Hilary Term

26 Geo. 2. 1753.

Goodtitle of the demise of Hood *versus* Stokes. B. R.

IN ejectment for lands in the county of *Warwick* tried in 1751. These words
the following case was made for the judgment of the court: "equally to
be divided" in
a deed of uses

John Gurl being seised in fee of the freehold lands in question, by make a te-
lease and release of the 6th and 7th of December 1695. granted and nancy in com-
conveyed the same to trustees, to the use of himself and his wife for mon.
life, and for the life of the longer liver of them, remainder to the
use of their children begotten between them in such shares and pro-
portion, and for such estate and estates, as the said *John Gurl* should
by his deed or will appoint; and for default of such appointment,
then to the use of all and every of the children of the said *John Gurl*
and their heirs equally to be divided amongst them.

John Gurl died without making any appointment, leaving four
children; and the single question is, whether by the words *equally*
to be divided amongst them, they shall take as tenants in common, or
as jointenants.

This case was learnedly argued, for the plaintiff in *Easter* term
last * by *John Eardley Wilmot* for the plaintiff, and *John Ford* for * Lord Ch.
the defendant; and again in *Michaelmas* term last by Mr. *Knowler* Just. of the
for the plaintiff, and Mr. *Hume* for the defendant, and Common
Pleas when
this work
was publish-
ed.

After time taken to consider till this term, *Lee* Chief Justice de-
livered the unanimous opinion of the whole court: That this being
deed of uses must be construed according to the intent of the par-
ties, which most plainly is, that the children should take *in common*;
and they relied upon the case of *Fisher and Wigg*, 1 *Salk.* 391.
where the same point was determined in the case of a copyhold sur-
rendered to the use of *A. B.* and *C.* and their heirs equally to be di-
vided between them and their heirs, and was held by *Turton* and
ould justices, *contra Holt* to be a tenancy *in common*, and judgment
as given accordingly, which (*Lee* Ch. J. said) was never reversed
notwithstanding what is said in the case of *Stringer and Phillips*,

Eq. Ca. Abr. 291. in the marginal note; they also cited the case of *Rigden and Valere* before the Lord Chancellor March 25, 1753, which was thus: *G. E.* by deed of the 5th of August 1710. in consideration of love and affection to his wife and children, covenanted to stand seised to the use of his wife for life, and after her decease, to the use of his two daughters and their heirs equally to be divided between them; one of the daughters made her will, and the question was, whether this was a *jointenancy* or a *tenancy in common*. My Lord Chancellor gave his opinion that it was *in common*; after he had taken time to consider, he said he had well considered the case, and that after he had delivered his opinion, if the parties were dissatisfied with it, he would send it to this court to be argued. Lord Chancellor said: "It is settled that the words *equally to be divided*" "in a *will* do create a *tenancy in common*; the word *equally* of itself "or the words *share and share alike*, will do the same"; but it is objected it must be taken otherwise in a *deed*; now I know of no solemn determination that these words will not make a *tenancy in common* even in a *deed*; the principal case as to this point is *Fisher v. Wigg*, which was said at the bar to be a doubtful authority, and that the judgment was said to be reversed; but there never was any reversal of it, or writ of error brought, and therefore it is an authority as to a surrender of copyhold lands; and the anonymous case in 2 *Vent.* 365. is directly in point to the present case, and upon the best consideration of this question, I am inclined to think that these words, "*equally to be divided*", be they in a *will* or *deed*, will make a *tenancy in common*, to say otherwise would be to contradict the intent of the parties; I have the great opinion of *Holt* against me, but *that* of the two Judges against him has more of natural justice and reason in it, though *Holt's* has more of refined legal learning; Justice *Gould's* argument is an extraordinary good one, and is not answered to my satisfaction. The Attorney General was satisfied with the Lord Chancellor's opinion, and there was a decree accordingly; and upon these authorities this court gave judgment in the case at bar, that the words *equally to be divided* in a *deed* creates a *tenancy in common*.

February 3, 1753. in this term, the Reporter was called to the degree of Serjeant at law.

The END of the FIRST PART.